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RECORD, CASE No. 14,125.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 165.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM DANIELS.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 1, 1890.

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1 & 2 # 56.

In the Supreme Court of Utah Territory.

WILLIAM DANIELS, Respondent,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Appellant.

Transcript.

P. L. Williams, attorney for appellant; Arthur Brown, attorney for respondent.

Marked: Filed in the office of clerk supreme court of Utah. Oct. 22, 1889. Jos. P. Bache, clerk.

3 In the District Court for the Third Judicial District, Utah Territory.

WILLIAM DANIELS, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY CO., Defendant.

Plaintiff complains of defendant above named and for cause of action alleges; for a first cause of action:

I. That the defendant now is and was at the times hereinafter mentioned a corporation organized and existing under the laws of the United States, and was and is the owner of and engaged in operating a certain line of railway in the Territories of Utah and Wyoming.

II. That on the third day of April, A. D. 1887, plaintiff was in the employ of the defendant and was engaged as a brakeman upon the freight trains of defendant running between Green River and Evanston, Wyoming.

III. That said defendant, through its negligence and carelessness, allowed a wheel of one of the freight cars used by defendant, and running on its road, to become defective by reason of a large
4 open crack in said wheel and which rendered it unsafe to use the same or the car to which the same was attached.

IV. That the crack in said wheel was an old crack and could have been easily discovered by a proper inspection of the wheel; that it was the duty of defendant to inspect the wheels of all cars used by it and running on its road at stations at short intervals along the line of its road; that defendant has established an inspecting station at Green River, Wyoming, and the defect would have been discovered at that place had the service of inspection been suitable and sufficient, but in fact the defendant negligently and wrongfully employed incompetent agents and servants to inspect at that point, and did not employ enough inspectors to properly do the work, so that those there hurriedly, improperly and negligently inspected the wheels, and the defect in the wheel, by which the ac-

cident hereinafter mentioned was caused, was not discovered, through the negligence and carelessness of defendant.

V. That on said last-named day, and while defendant was in the due performance of his duties as such brakeman, and without fault or negligence on his part, and while the train was running at an ordinary rate of speed, the said defective wheel suddenly broke and threw the train from the track, the car upon which plaintiff was riding being overturned, and plaintiff was thrown violently to the ground and was thereby maimed and bruised, having one of his legs broken, and his collar-bone also broken, and receiving also other serious internal and external injuries. That thereby plaintiff suffered and still does suffer great pain of body and mind. That the injuries which plaintiff received as he is informed and believes are permanent in their character, rendering him unfit to pursue his ordinary vocation or to perform any manual labor.

VI. That by reason of the injuries thus received, plaintiff has been and is damaged in the sum of thirty thousand dollars.

Wherefore plaintiff prays judgment—

First. For the sum of thirty thousand (30,000) dollars damages.

Second. For costs of suit.

ARTHUR BROWN,
Attorney for Plaintiff.

5 TERRITORY OF UTAH, } ss:
County of Summit, }

William Daniels, being first duly sworn, deposes and says that he is the plaintiff above named; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein alleged upon information and belief, and as to these matters he believes it to be true.

WILLIAM DANIELS.

Subscribed and sworn to before me this 6th day of December, A. D. 1887.

JAMES E. BROMLEY,
Justice of the Peace.

No. 7114. Title of court and cause. Complaint. Filed December 9, 1887. H. G. McMillan, clerk, by J. M. Zane, deputy clerk. Issued December 9, 1887.

(Title of Court and Cause.)

Answer.

The defendant, for answer to the cause of action in said complaint stated, denies that it, through its carelessness or negligence or at all, allowed the said wheel to become defective by reason of the said or any crack therein, or which rendered it unsafe to use the same, or the car to which it was attached.

Denies that the said alleged crack was an old crack or could have been easily or at all discovered by proper inspection of said wheel. And defendant further denies that the alleged defect would have been discovered at said Green River station had the service of inspection been suitable or sufficient, and denies that the said or any discoverable defect existed in said wheel at the time it left said station.

6 And defendant denies that it negligently or wrongfully or at all employed incompetent agents or servants to inspect at said station, and denies that it did not employ enough inspectors to properly do the work so that those there hurriedly, improperly or negligently inspected said wheels, or that the alleged defect in the said wheel, by which said accident was caused as alleged in said complaint, was not discovered through the negligence or carelessness of this defendant.

And upon its information and belief the defendant denies that the said or any defective wheel broke or threw the said train from track, the car upon which plaintiff was riding being overturned, or plaintiff was thrown to the ground, or that the plaintiff was thereby maimed or bruised, having his leg broken or his collar-bone broken or receiving other injuries; or that thereby the plaintiff suffered or still does suffer great or any pain of body or mind; or that said injuries so received are permanent in their character, rendering plaintiff unfit to pursue his ordinary vocation or to perform any manual labor.

And the defendant denies that by reason of the injuries so received as alleged in said complaint the plaintiff has been damaged in the said sum of thirty thousand dollars or any part thereof.

Wherefore the defendant prays judgment for its costs.

P. L. WILLIAMS,
Attorney for Defendant.

TERRITORY OF UTAH, }
Salt Lake County, } *ss:*

P. L. Williams, being first sworn, says that he is the attorney of the defendant company, and makes this verification on its behalf and for the reason that all of the officers thereof are absent from the said county where affiant resides.

Affiant further says that the foregoing answer is true of his own knowledge, except as to the matters therein stated on information and belief, and those he believes to be true.

P. L. WILLIAMS.

7 Subscribed and sworn to before me the 14th day of February, 1888.

[L. S.] WALDEMAR VAN COTT,
Notary Public.

No. 7114. Title of court and cause. Answer. Received copy hereof February 14, 1888. Arthur Brown, attorney for plaintiff. Filed February 14, 1888. H. G. McMillan, clerk. By J. M. Zane, deputy clerk.

(Title of Court and Cause.)

Verdict.

We, the jurors impaneled in the above case, find the issues for the plaintiff, and assess his damages at the sum of ten thousand (10,000) dollars.

Dated November 27, 1888.

A. T. RILEY, *Foreman.*

Filed November 27, 1888.

HENRY G. McMILLAN, *Clerk.*

(Title of Court and Cause.)

This action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve (12) persons was regularly empaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and, being called, answered to their names, and say they find a verdict for the plaintiff as follows, to wit:

"We, the jurors impaneled in the above case, find the issues
8 for the plaintiff and assess his damages at the sum of ten thousand (10,000) dollars.

Dated November 27, 1888.

A. T. RILEY, *Foreman.*"

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff have and recover from said defendant the sum of ten thousand (10,000) dollars, with interest thereon at the rate of ten per cent. per annum from the date hereof, till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of one hundred four and $\frac{90}{100}$ (104.90) dollars.

Judgment entered November 27, A. D. 1888.

(Title of Court and Cause.)

I, the undersigned, clerk of said court, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action.

Attest my hand and the seal of said court this twenty-seventh day of November, A. D. 1888.

HENRY G. McMILLAN, *Clerk.*

Title of court and cause. Judgment on verdict. Filed November 27, 1888. Henry G. McMillan, clerk.

(Title of Court and Cause.)

To the said plaintiff and to Arthur Brown, Esq., his attorney:

You are hereby notified that the said defendant intends to move the said court for a new trial herein, upon the following grounds, to wit:

9 First. Excessive damages appearing to have been given under the influence of passion and prejudice.

Second. Insufficiency of the evidence to justify the verdict, and that it is against law.

Third. Error in law occurring at the trial and excepted to by the defendant.

The said motion will be made on a statement of the case.

P. L. WILLIAMS,
Attorney for Defendant.

Dec. 6th, 1888.

7114. Title of court and cause. Notice of defendant's intention to move for a new trial. Received copy hereof this, the 7th day of December, 1888. Arthur Brown, attorney for plaintiff. Filed December 7th, 1888. Henry G. McMillan, clerk. P. L. Williams, attorney for defendant.

(Title of Court and Cause.)

Statement of the Defendant on Motion for a New Trial.

The above-entitled cause came on for trial in said court, at the court-room in Salt Lake City, Utah, before Hon. Elliot Sandford, judge thereof, and a jury duly empaneled, on Monday a. m., November 26, 1888.

The plaintiff appeared by Arthur Brown, Esq., his attorney, and the defendant by P. L. Williams, Esq., its attorney.

Thereupon the following proceedings were had:

Testimony.

WILLIAM DANIELS, being sworn as a witness in his own behalf, testified as follows:

10 Redirect examination.

By Mr. BROWN:

Q. Mr. Daniels, where do you now live?

A. At Parley's park, Utah.

The COURT: What place did you say?

A. Parley's park, between Snyderville and Park City, Summit county, Utah.

Mr. BROWN: At what place did you reside in the spring of 1887, prior to and at the time of the accident referred to?

A. I resided at Echo City.

Q. Were you in the employ of the company?
A. Yes, sir.
Q. Of the defendant?
A. Yes, sir.
Q. When did you enter the employ of the company?
A. About 1884.
Q. 1884 to 1887, had you been continuously in their employ during that time?
A. Not all the time brakeman; in their employ, yes, sir.
Q. In their employ. How long had you been braking?
A. Between two and three years.
Q. What wages were you getting in the spring of 1887?
A. Well, we were getting two cents a mile, I think, as near as I can remember—two cents a mile.
Q. You got paid by mileage?
A. Yes, sir.
Q. How much did that amount to a month, the way you were working, or about how much?
A. About $75 a month.
Q. What was your run, if you had any particular run?
A. Between Ogden and Green River.
Q. Were there any particular trains to which you belonged, or did you go as you were sent?
A. There was no particular trains, no, sir.
Q. Who directed you where and when you were to go?
A. A. B. Leggett, the train-despatcher.
11 Q. Where was his place?
A. At Evanston, Wyoming.
Q. The train-despatcher at Evanston directed where you was to go and whom you was to run with?
A. Yes, sir.
Q. On the occasion when this injury occurred, or on the day before the injury occurred, where had you been running?
A. Between Ogden and Evanston.
Q. Which way?
A. Going east.
Q. When did you leave Ogden?
A. Between four and five o'clock in the morning.
Q. Between four and five o'clock in the morning of the same day that you was hurt?
A. Yes, sir.
Q. And when did you arrive in Evanston?
A. Somewheres about ten or eleven o'clock; I don't remember which.
Q. In the forenoon?
A. In the forenoon.
Q. When did you receive orders as to what train you were to go back on—I mean Green River, not Evanston. What time did you arrive in Green River?
A. About 6 o'clock.
Q. In the evening?

A. Yes, sir.
Q. When did you receive orders upon what train you were to return?
A. Well, I didn't receive no orders; I made a change with another party.
Q. And came back?
A. To go to Ogden, and then went back on his crew, and changed off at Green River on my own crew.
Q. Changed at Green River, and came back on what train?
A. On the fourth section of 19.
Q. The fourth?
A. The fourth section of 19.
12 Q. That was the train on which you came back?
A. Yes, sir, on which I started back.
Q. State whether that train had been made up before you left Green River?
A. Yes, sir.
Q. Was it made up before you arrived at Green River?
A. It was made up when we arrived at Green River.
Q. What was your position, head brakeman or second brakeman?
A. Hind brakeman—second brakeman.
Q. Who was head brakeman?
A. Robert Ellis.
Q. Do you know whether he was familiar with the road or not?
A. Yes, sir; he wasn't familiar with the east end of the road.
Q. With that part of it?
A. Yes, sir.
Q. What time did your train leave——
A. (Interrupting.) Between 7 and 8 o'clock, as near as I can remember.
Q. Green River, on its return trip? Who was the conductor?
A. J. M. Kolbeck.
Q. How many hands of you were there to man the train?
A. Two brakemen.
Q. Two brakemen and the conductor?
A. Yes, sir.
Q. And the engineer and fireman?
A. Yes, sir.
Q. Going out of Green River westerly, whereabouts did you go—what part of the train did you go to?
A. I was sent out to the head end of the train.
Q. Above—whereabouts?
A. On top of the train.
Q. At the time of this accident, what were you doing?
A. I was holding the train down hill.
Q. What?
13 A. Holding the train.
Q. Holding the train—holding on the brake?
A. Yes, sir.
Q. Did you see anything at the time of the accident?

A. Yes, sir.

Q. Just state what you saw or knew of the accident, as you saw it; if you became unconscious, state at what point.

A. Well, I saw, two and a half or three miles east of Bryan, I saw a flash of fire; about the same time the flash of fire occurred, I saw something strike the dump—the opposite side of the dump, on the south side of the track, and make a dust, and at that time I whirled right around and grabbed the running board of the car, and that's the last I remember until I was under the car.

Q. That is all you know as to the wreck then, yourself?

A. Yes, sir, that is all I know of the wreck at that time.

Q. When you came to, where did you find yourself?

A. Found myself under a car—car laying across here. (Indicating.)

Q. Came to, under the car, did you?

A. Well, I came to just about the time the car made another lunge on top of me.

Q. How long did you lay there, that you was conscious of, before somebody got you out?

A. Well, I couldn't say, I am sure.

Q. Who got you out, do you know?

A. J. M. Kolbeck was one of the parties.

Q. The conductor?

A. The conductor, yes, sir. Bob Ellis was the other one—brakeman—and Richard Richardson was another one. He was carpenter at that time, I believe, or scale-tester, I don't know which.

Q. Just describe the condition in which you were when they got you out?

A. Well, my legs were crossed in this shape (illustrating). The car laid right across, but this leg was between the two cars, from here to the thigh, pinched between the oil-tank car and box
14 car—pinched the flesh, scratched the muscles of the legs and cords—pulled it loose from the bone.

Q. How long did you lie there before you got out?

A. Well, 2.40, I think, or two hours and a half—about two hours and a half.

Q. Two hours and a half after you came to?

A. Two hours and a half, I came to just about the time the car struck me; I was struck when I fell off the car—striking on the side of my head, and this right shoulder.

Q. What kind of a car was it that was on you?

A. Well, I couldn't say, I am sure; box car.

Q. After you were taken out from the car, where were you taken to?

A. I was taken in the caboose.

Q. From there where?

A. I was taken from the wreck on top of the Bryan hill, between four and five miles; I was left there about two or three hours as near as I can remember.

Q. Then where were you taken?

A. Taken from there to Green River.

Q. Whereabouts in Green River?
A. To the Pacific hotel.
Q. Were you attended there?
A. Well, they called a doctor in there to look at me.
Q. Whom did they call?
A. Gilligan, I think it was; they fetched him to Bryan—left him there; he went in with them to Green River.
Q. Do you know whom he was called by?
A. No, sir.
Q. Do you know whether he was one of the company's doctors?
A. No, sir, I don't.
Q. How long were you attended there by Gilligan?
B. Just a very few moments.
Q. Few what?
A. Few moments.
Q. After that where were you taken?
15 A. I was taken to Evanston, to my home there.
Q. And were you attended there?
A. Yes, sir.
Q. By whom?
A. By Hocker—W. A. Hocker I believe his name is.
Q. State whether he was one of the company's doctors.
A. Yes, sir.
Q. Did you find out for yourself there what was the matter with you—where you were injured?
A. At Green River?
Q. At Evanston.
A. Yes, sir, I found out; that is, part of it; that I had a leg broke; that was all—jammed.
Q. When was your leg set?
A. It was set—I was taken to Green River and back to Evanston again the next day and laid until ten o'clock the next day before my leg was set.
Q. Now, you said to Evanston, your home. I understood you to say you lived at Echo.
A. My things had just come there that night that the wreck happened.
Q. To Evanston?
A. Yes, sir. My home was at Echo that night—that day rather.
Q. You say your home; were you a married man?
A. Yes, sir.
Q. After your leg was set, who attended upon you, and how long?
A. Hocker—W. A. Hocker.
Q. All the time, eh?
A. Yes, sir.
Q. How long were you laid up?
A. Well, between about—about three months, as near as I can remember.
Q. Three months, you were laid up?
A. Yes, sir; that is, I was under his care.
Q. Then you began to walk around, did you?

16 A. Yes, very little.

Q. When you got so that you recovered sufficiently to walk around, what did you find as to your person—what did you find was the matter with you?

A. Well, I find that I have one leg—the left leg is short and stiff, weak; my right leg is weak also, and the shoul-er is broken—that is, weak on the shoulder.

Q. You say right shoulder broken; where and how is your right shoulder broken?

A. The shoulder isn't broken; it is a bone in there that is broke in two, that operates the shoulder up and down.

Q. What happens to it when you raise it up in that way, anything?

A. Well, it is weakness.

Q. Which shoulder is it?

A. Right shoulder.

Q. Have you had any physician examine you recently, or since this lawsuit was begun, or about the time it was begun, with a view to seeing and inspecting your injuries?

A. Yes, sir.

Q. Whom?

A. Dr. Benedict.

Q. Of this city?

A. Yes, sir.

Q. You say your left leg is the short one?

A. Yes, sir.

Q. And your right leg is weak?

A. My right leg is weak.

Q. Whereabouts and what is the matter?

A. Well, this here bone (indicating) that has something the matter with it; can't tell what is the matter with it.

Q. Well, I didn't mean scientifically what was the matter, but as far as your feelings and as far as you can see, what is the matter with it?

A. It is weakness.

Q. It is weakness in what bone?

A. In the thigh bone, and in the knee.

17 Q. And this other leg you say is too short?

A. Yes, sir.

Q. Anything else the matter with it?

A. Well, there is a deformity in my leg.

Q. What kind of deformity; is it there—that sticks out there?

A. Yes, sir.

Q. What kind of deformity causes that?

A. A break, I should judge.

Q. Well, how does it look—the appearance of it?

A. Looked to me like the bones were slipped by, in that shape. (Illustrating.)

Q. Can you see, to determine that with your eye?

A. No, I don't know that I can.

Q. Can you with your hands?

A. Yes, sir.

Q. When you were lying there under the car, state whether you suffered any pain or not.

A. Yes, sir.

Q. To what extent—what kind of feelings did you have as you lay there?

A. Pains all over here, (indicating) blood stopped up.

Q. During the process of your being attended and healing, state whether you suffered anything or not.

A. Yes, sir.

Q. To what extent and in what way did you suffer?

A. Suffered in the knitting of my leg, and my shoulder muscle; I had more pain in my shoulder than I had in my leg.

Q. Since you were able to get up and walk about, what, if anything, have you been able to do?

A. Well, not much of anything; no daily labor of any kind.

Q. What?

A. No daily labor of any kind.

Q. No daily labor of any kind?

A. No, sir—manual labor.

Q. How old were you when this accident occurred?

A. I was about—a little over twenty-five years old.

Q. Between twenty-five and twenty-six years of age?

18 A. Yes, sir.

Q. What had been your health and strength up to that time or what was it at that time.

A. Good; first class.

Q. Any injury?

A. No, sir.

Q. These injuries that you describe, state when they were received?

A. On the 3rd of April, 1887.

Q. Well, on that occasion that you mentioned?

A. Yes, sir.

Q. Do you know where Mr. Kolbeck is, that was the conductor?

A. I do not, not at the present time.

Q. Who was the engineer?

A. Dave Payne.

Q. Where is he?

A. Well, I think he is between Evanston and Green River.

Q. And the foreman, where is he?

A. He is on the road: he is running an engine now.

Q. For the defendant?

A. The Union Pacific.

Q. And Mr. Richardson?

A. At Evanston.

Q. In the employ of the company?

A. Yes, sir.

Q. All these in the employ of the company except the conductor?

A. Yes, sir.

Q. And the conductor is away?

A. Yes, sir.

Cross-examination of WILLIAM DANIELS.

By Mr. WILLIAMS:

Q. Mr. Daniels, you say you left Ogden on the morning of the same day that you were injured?

A. Yes, sir.

19 Q. Between four and five o'clock?

A. As near as I can remember, yes, sir.

Q. With an east-bound freight train?

A. East-bound special freight.

Q. And run through to Green River, by about 6 o'clock in the afternoon of that day?

A. Yes, sir, as near as I can remember, it was about that time.

Q. How was it you came to return, or start to return, that evening to Ogden again? Was it?

A. Yes, sir; I started to return as far as Evanston, I presume.

Q. You supposed you were going back as far as Evanston?

A. Yes, sir.

Q. Do I understand that you were ordered back by the train-despatcher, Mr. Leggett?

A. No, sir, not to go back on that train.

Q. State to the jury how it was that you started back so soon?

A. I had made a change with a brakeman by the name of Swartout; he was braking for Reese at the time—a man by the name of Reese, conductor.

Q. When did you make that change?

A. On the morning of the 2nd of April—on the afternoon, rather.

Q. Of the 2nd?

A. Yes, sir.

Q. The change, then, was to go out in his place?

A. Yes, sir.

Q. On the morning of the 3rd?

A. Yes, sir; to go to Echo—I was to go to Ogden on his crew.

Q. What say?

A. I was to go to Ogden on his crew.

Q. On what day?

A. On the 2nd of April.

Q. And did you go?

A. Yes, sir; I got a change-off with Mr. Leggett; he was to go with my crew east.

20 Q. And you went in his place to Ogden?

A. Yes, sir.

Q. How did that change happen to be made?

A. I asked Mr. Leggett if I could go in Mr. Swartout's place to Ogden; my wife was at Echo and I wanted to fetch her to Evanston.

Q. You were not then running with your regular crew?

A. Not at the time I went to Ogden; no, sir.

Q. When you started out on the morning of the 3rd, were you with your regular crew?

A. No, sir.

Q. How long was this change-off to last?

A. Well, it was to last until we had another chance to change back again.

Q. When you made a change-off, you went down to Ogden and then back to Green River?

A. Yes, sir.

Q. And then in pursuance of that, it became still necessary to fill his place on the return trip to Green River?

A. Yes, sir.

Q. That is the fact, is it?

A. Yes, sir.

Q. This you did to accommodate yourself with reference to moving out, I understand?

A. Well, yes; that is what I told Mr. Leggett at the time.

Q. Well, that was the fact, was it?

A. Yes, sir.

Q. Now, what time was it when you left Green River to return westward?

A. Between 7 and 8 o'clock, as near as I can remember.

Q. So that you were there only an hour or a little more?

A. I was there long enough to get supper, yes, sir.

Q. About time to get your supper, and turn about and come back—start back?

A. Yes, sir.

Q. And you say you were on the fourth section of train 19?

A. Yes, sir.

21 Q. That was a freight train?

A. Yes, sir.

Q. And how many men were there in the crew—five altogether?

A. Five altogether in the crew, yes, sir.

Q. The engineer's name was what?

A. Dave Payne.

Q. And Conductor Kolbeck?

A. Yes, sir.

Q. And who was foreman?

A. His name was James Whipple.

Q. And who was the other brakeman?

A. Bob Ellis.

Q. You hadn't been in the habit of running with Ellis, then?

A. Yes, sir, that was my regular crew.

Q. Oh, that was your regular crew? When did you get with your crew then?

A. Understand, we were called from the branch—from Park City branch—to go with the main line, both of us.

Q. Was he changed off too, then?

A. Yes, sir, he was put on the same crew.

Q. I understood that you had changed off with another brakeman, and wasn't with your own crew at this time?

A. I was with my own crew when the wreck happened, yes, sir.

Q. When did you join your own crew?

A. At Green River.

Q. But on the day previous, running from Echo down to Ogden, and then running from Ogden to Green River, was during the change-off?

A. I didn't understand.

Q. The run from Echo on the second, from Evanston to Ogden, was it?

A. Yes, sir.

Q. Then back on the day of the 3rd to Green River, was while you were changed off with this other brakeman?

A. Yes, sir.

22 Q. And you then met your own crew at Green River?

A. Yes, sir.

Q. So that you took your own place then on the return?

A. Yes, sir.

Q. And this Bob Ellis was your fellow-brakeman then, belonging with you?

A. Yes, sir.

Q. How long had you then been running on that division?

A. That was my third trip on the main line.

Q. Your third trip on the main line?

A. Yes, sir.

Q. You had been changed off from the Park branch?

A. Yes, sir.

Q. With Bob Ellis?

A. Yes, sir.

Q. Well, had you ever run over this portion of that road previous to that?

A. Yes, sir.

Q. How long before?

A. Well, I was there pretty near a year and a half on the main line.

Q. Running over this same district?

A. Yes, sir, between Ogden and Green River.

Q. Then afterwards you went to the Park City branch?

A. Afterwards I had a lay-off for about five months, and I was called—that is, I asked where I should go again, when I came back, and they put me on the Park City branch.

Q. How long did you run there?

A. I was there about a month.

Q. Then you went back on this road?

A. Yes, sir, I was called back on the road.

Q. You say Ellis was the head brakeman regularly?

A. Yes, sir.

Q. And you second brakeman?

A. Yes, sir.

Q. Now, where were the relative positions of these brakemen on the train?

23 A. I don't understand that question.

Q. Where was the head brakeman on the train; toward the engine?

A. Yes, sir.

Q. On the front of the train?
A. On the front of the train.
Q. And the second brakeman is on the rear part?
A. Yes, sir.
Q. But you changed places on this occasion?
A. No, I was sent there to either hold the train down the hill or help him, or show him the hill.
Q. What hill is that?
A. That is Bryan hill.
Q. Just the other side of Bryan Station?
A. Yes, sir.
Q. After leaving Green River, coming this way, you came up grade for a time?
A. Yes, sir.
Q. Get on top of the divide, and then come down a hill on the other side, do you?
A. Yes, sir.
Q. Is that what they call Peru hill?
A. That is what they call Peru hill sometimes.
Q. Who directed you to go over and show Mr. Ellis?
A. J. M. Kolbeck, the conductor.
Q. Mr. Ellis not being familiar with the grades on the route, you went over toward the head end of the train, did you?
A. Yes, sir; that was his first trip on the east end of the road.
Q. Where was that order given you?
A. Going up just the other side of Peru hill.
Q. Where were you at the time it was given you?
A. I was in the caboose.
Q. With the conductor?
A. Yes, sir.
Q. So, on account of Mr. Ellis not being familiar with that portion of the road, you went over to show him how to hold the train down the hill?
24 A. Yes, sir.
Q. Do you remember how many cars there were in that section?
A. I think there was 25 cars, as near as I can remember.
Q. It was a full train?
A. Yes, sir.
Q. How many engines?
A. One engine—well, two engines up the hill and one down.
Q. They have a helper out of Green River, for heavy trains?
A. Yes, sir; when they are required.
Q. How was that night, dark or light?
A. Well, no, it wasn't a right dark night.
Q. Did you have a moon?
A. Well, I don't know now; I couldn't say.
Q. But it wasn't dark?
A. It was so dark—that is, from the flash of the fire you could see thirty yards outside of the track.
Q. How long is that Peru hill?

A. It is about, between four and five miles long.
Q. Pretty heavy grade?
A. Well, no; not extra heavy.
Q. How far were you from the engine at the time you saw this, whatever it was, fly out and strike the bank or dump?
A. I was between about six and seven cars back of the——
Q. Of the engine?
A. Of the car that went off from the track—the first car; about eight or nine cars behind the engine.
Q. About eight or nine cars behind the engine?
A. Yes, sir.
Q. Now, in the division of the train between brakemen, was the number of cars divided about equally, where there were two brakemen?
A. No, sir.
Q. How many would you regularly have to attend to, in a train such as that, about 24 or 25 cars, and how many would the other brakeman have to attend to?
25 A. One man is supposed to hold them down Green River hill—down Bryan hill.
Q. One man is supposed to be able to hold such a train?
A. Yes, sir.
Q. And the second one goes along, of course, for emergency, and to assist if assistance is necessary?
A. Yes, sir.
Q. Well, was that the rule in running down that hill, ordinarily, that one brak-man did the braking to hold the train?
A. Yes, sir; the head brakeman.
Q. Where was Mr. Ellis at the time that you observed this thing, whatever it was, fly off?
A. I couldn't tell, I am sure.
Q. Was he near you?
A. No, sir; he must have been about three or four cars back of the engine.
Q. And then three or four cars ahead of you?
A. Oh, he was about six or seven cars ahead of me; he must have been somewhere near the car that left off the track—the first car; that is, when I left him; I don't remember where he went to after that.
Q. Had you been further ahead with him, coming down the hill?
A. Yes, sir; I had been on the front end of the train until we struck the little let-up; after we got beyond that I started to the back end of the train.
Q. So that you went forward to where Mr. Ellis was, at the top of Peru hill?
A. Yes, sir.
Q. How near to the engine did you go?
A. I went right to the next car, right behind the engine.
Q. Right next to the tender?
A. Yes, sir.

Q. Were they all box cars in this train?
A. No, sir; there were two oil tanks.
Q. Were the rest box cars.
A. Yes, sir.
26 Q. Now, you went onto the car right next to the engine; Mr. Ellis was there?
A. Yes, sir.
Q. How long did you remain together?
A. I remained there about four minutes—between four and five minutes.
Q. And what did you do while you were together?
A. I held the train down to the level; he never done anything.
Q. So you showed him—what was it you did?
A. I showed him about how many brakes it would take to hold the train down the hill.
Q. Was there any instructions or example given him as to about how tight they were to be set?
A. No, sir.
Q. Who put on the brakes?
A. I put them on.
Q. He was along with you, and saw how you did it; was that it?
A. Yes, sir.
Q. How many brakes did you set?
A. I had about six brakes set, as near as I can remember—about six or seven brakes.
Q. Those were on the cars nearest the engine, were they?
A. Yes, sir.
Q. That hill is about how long?
A. Between four and five miles long.
Q. So, you set up six or seven brakes?
A. Yes, sir.
Q. When you started down the hill, did you?
A. Yes, sir.
Q. And did you stay with him until you got down the hill?
A. I staid with him until we got on the let-up, that is about two and a half miles from Bryan.
Q. Then you stayed with him until you got down the hill?
A. No, sir; I went back towards the hind end of the train after we got to the let-up.
27 Q. That would be after you got down to the foot of the hill?
A. No, sir; what they called a let-up is a flat place.
Q. Then they come down again?
A. Yes, sir.
Q. When you got to this let-up, or easier place, you left him then and went back?
A. Yes, sir; started back to the hind end.
Q. When you came to that let-up, do they loose any of the brakes?
A. Yes, sir.
Q. Who did that?

A. I did.
Q. How many did you loose?
A. I loosed all but three of the brakes.
Q. What distance is this let-up or easier grade?
A. Well, it is about a quarter of a mile, I should judge.
Q. And then the brakes have to be set again?
A. Yes, sir.
Q. Who did that?
A. Mr. Ellis.
Q. You showed him how to do it?
A. He set part of them on the head end, and of course I held the back end.
Q. How far back?
A. I was back about six or seven cars from him at the time of the accident.
Q. You set how many brakes, as they went over the let-up?
A. I had two brakes, as they went over the let-up, so as to keep the slack out of the train.
Q. Did you set any others after they got over that?
A. I started to set one, and that is the last I set.
Q. So it was as you passed this easier grade, and started down the further part of the hill—it was just about then, was it, that the wreck came?
A. Just at the lower end of the cut; there is a big cut here, that is about three or four hundred yards long, I should judge; right at the mouth of the cut when it happened.
28 Q. Where was it with reference to the final foot of the hill?
A. How far was it?
Q. Yes?
A. Well, it was about two miles and a half from the wreck, where it occurred, to the foot of the hill.
Q. Until you get down onto the Bryan level?
A. Yes, sir.
Q. And about what distance had you come before the wreck after starting down the hill—on top of Peru hill?
A. We came about three miles.
Q. It would be about two miles from there or two and a half, until you would come down to Bryan level?
A. Yes, sir, Bryan Station, rather.
Q. Well, you came down to the foot of the hill, quite a little distance before you came into the station?
A. Yes, sir.
Q. A mile, isn't it?
A. No; not that far; it is a little bit down-grade right to the *the* station.
Q. Now, about how many brakes altogether were set during the time, from the top of the hill down to the point of the wreck?
A. Well there would be about seven brakes; that is, seven brakes on the head end, was what I had set, at the let-up, and I don't know whether he had set any after I left him, but I had two set, and was setting another when it occurred.

Q. I understand you, when you went over the top of the hill with Mr. Ellis, and coming down, before you got to that let-up you had six or seven brakes set, you think?

A. Yes, sir.

Q. And then you let off some of those when you came to the let-up?

A. Yes, sir.

Q. And you separated from Mr. Ellis?

A. Yes, sir.

Q. And you went back some few cars?

A. Yes, sir.

29 Q. Then starting down on the heavier grade again you set up a couple of brakes?

A. Yes, sir.

Q. Whether he had set up any or not, you don't know, but supposed he had?

A. Yes, sir, supposed he had.

Q. Because he should have done so, starting down the steeper grade; was that it?

A. Yes, sir, I showed him.

Q. You were about eleven cars from the engine at the time this accident occurred?

A. Yes, sir.

Q. You were back six or seven cars from him?

A. When I left him, he was back three or four cars from the engine, I couldn't tell exactly.

Q. And at the time of the wreck, you were about how many back from him?

A. I was about seven cars, I think.

Q. So it would make nine or ten cars altogether?

A. Yes, sir, from the engine.

Q. Were you on top of a box car?

A. Yes, sir.

Q. Where were these oil cars, ahead of you or back of you?

A. Right next to me; ahead of me.

Q. You were looking forward at the time of this——

A. (Interrupting.) Yes, sir, I was setting a brake.

Q. With your face from the engine?

A. Yes, sir,

Q. Saw something fly out?

A. Saw a flash of fire first, and looking ahead I saw something that flew out.

Q. Flash of fire from under the car?

A. Yes, sir, on the rail.

Q. Did the brakes ever produce any friction—flash of fire?

A. Yes, sir.

Q. I suppose you see that frequently at night, where brakes are set pretty tight?

30 A. Yes, sir, but this was right on the rail, where this flash of fire was.

Q. These brakes you had set, up at the top of the hill, were set pretty tight, were they not?
A. Well, no, sir, not extra tight.
Q. How long did it take you to set up six or seven brakes?
A. Well, about two or three minutes.
Q. That would be plenty of time?
A. Yes, sir, to set them up and let them off again.
Q. How?
A. To set them up and let them off again, so as not to slide a wheel, or anything.
Q. You have to gauge that so as to let a wheel turn, do you?
A. Yes, sir.
Q. And not set them tight enough to turn a wheel?
A. Yes, sir.
Q. That is, of course, the rules?
A. Yes, sir.
Q. Are you able to tell, by your observation, the way a train feels or moves, whether a wheel is sliding or not?
A. Yes, sir.
Q. When you find you have got it too tight, you slack a little, do you, to get the wheel going?
A. Yes, sir.
Q. What were you doing after you set these six or seven brakes, until you left Mr. Ellis—until you got down on this let-up; were you talking?
A. No, sir.
Q. But you were near together?
A. Near together.
Q. You were not engaged all the time setting brakes—you got those all set——
A. (Interrupting.) Well, the general rule is to set a brake and let it off at a time when it gets too hot; if the hill is long, you will set it and let it off again, and set another brake instead of it, one that you haven't used at all.
31 Q. That is for the purpose of preventing the wheels getting too hot by the friction?
A. Yes, sir.
Q. Well, had you loosed and set other brakes while you were going down this ease-up?
A. Yes, sir.
Q. How many different brakes did you set altogether, six or seven?
A. Well, I think about ten different brakes.
Q. Keeping about six or seven on at a time?
A. Yes, sir.
Q. And all those brakes that you set were at the forward end of the train?
A. Yes, sir.
Q. Not going back farther than about ten cars?
A. Until I struck the let-up.
Q. Are you able to give an estimate of about how many cars

ahead of you it was, from which this piece of wheel, if it was a piece of wheel, flew out and struck the bank?

A. I think it was about six or seven cars; that is as near as I can remember.

Q. Of course you can't tell closely, but it was some little distance ahead of you?

A. Yes, sir.

Q. You saw the flash of light, and something flew out and struck the bank, and knocked up the dirt?

A. Yes, sir.

Q. And almost immediately the wreck came?

A. Yes, sir; just at the time of the flash of fire; it was all done in three or four seconds, I should judge.

Q. The cars that first went off were some ahead of you, yourself?

A. Yes, some ahead of me went off—all ahead of me.

Q. In other words, the car you were on was not the first one that left the track?

A. No, sir.

Q. It was in advance of you that the cars first left the track?

32 A. Yes, sir.

Q. Do you know about what time of night it was when the accident occurred?

A. Well, I couldn't say, I am sure.

Q. About how far is that this side of Green River, if you are able to state?

A. Well, that is about—must be sixteen miles, I should judge, as near as I can get at it.

Q. You say you were about two hours or two hours and forty minutes before the car was removed?

A. Yes, sir; two hours and forty minutes.

Q. The men along were not able to get you out earlier than that?

A. No, sir.

Q. They were trying to get you out, were they?

A. Yes, sir.

Q. Then you were taken back; you say a doctor was called; Dr.——

A. Gilligan.

Q. Where was he called from, if you know?

A. I don't know, I am sure.

Q. You don't know who called him?

A. No, sir.

Q. He came to you at the wreck, did he?

A. Yes, sir; after I was taken out.

Q. And accompanied you back to Green River?

A. Yes, sir.

Q. How were you taken back to Green River?

A. In the caboose; the caboose I was brakeman on.

Q. That was at the rear end of the train; where did you get the motive power?

A. It was sent from Green River, I suppose.

Q. You suppose they sent an engine from Green River?

A. Yes, sir.

Q. You were taken back in the caboose to Green River, and Dr. Gilligan went down with you, and you remained there how long?

33 A. I remained there until the next day about—well it was in the afternoon some time when the passenger came in.

Q. Then you were brought on the passenger train?

A. As soon as the track was cleared and the wreck out of the way, I was brought through; I couldn't say what time it was when I left Green River.

Q. And you were then brought up to Evanston?

A. Yes, sir.

Redirect examination of WILLIAM DANIELS.

By Mr. BROWN:

Q. I judge from your answer now, that I didn't understand the former answer that you made; was your leg set the next day after the accident, or the next day, or when?

A. I laid in Green River that night, the next day until in the afternoon some time, was taken to Evanston,—was taken home, and laid there until ten o'clock the next day.

Q. So that it was a day, and until ten o'clock of the third day. Had you run over—was that a regular time of train leaving?

A. No, sir.

Q. It was an irregular train?

A. You mean the freight train I was on?

Q. Yes.

A. No, sir.

Q. It was an irregular time?

A. Yes, sir.

Q. Was there a night freight that usually went out?

A. Yes, sir.

Q. Had you run over it before?

A. Yes, sir.

Q. Do you know from what it was made up?

A. The train that we usually went out on?

Q. Yes.

A. No, I couldn't say.

Q. Well, you don't know that particular train, because you wasn't there, but the train that goes out in the evening from

34 Green River, westward, do you know from what it was made up, or should have been made up, at that time?

A. No, sir, I don't.

Q. Don't know the elements that went into it—where they came from, or how long they had stayed there, or anything about it?

A. No, sir, I couldn't say.

Q. Was it your duty to obey the conductor in going up to put on brakes?

A. Yes, sir.

Q. What kind of a track was it at the point where this wreck occurred, as to being crooked or winding?
A. It was a straight track.
Q. What sort of track was it?
A. A little down-grade.
Q. As to the rails; were they all right there.
A. I couldn't say, I am sure.
Q. Was this change that you spoke about made with the knowledge and approval of Mr. Leggett?
A. Yes, sir.
Q. You talked with him about it?
A. Yes, sir.
Q. Before it was made?
A. Yes, sir.
Q. So that you were re-assigned for the other work, then?
A. Yes, sir; got his permission to change.
Q. Do you know why they were so long getting you out from under the car?
A. I do not.
Q. Do you know what was on top of you?
A. Well, there was a box car on top of me; I couldn't say what it was loaded with.
Q. Do you know whether any other car was telescoped into it?
A. No- that I know of.
Q. Or oil tanks.
A. They were right in below me.
Q. Right next to you?
A. Right next to me.
Q. How many oil tanks?
A. Two oil tanks.
Q. Did that vicinity of the oil tanks make any difference with the length of time you lay there?
A. I presume it did.
Q. Why?
A. They was both of them busted, and there was considerable gas, and they couldn't use no lights.
Q. Had to work in the dark?
A. Yes, sir.
Q. Did they get afire at all?
A. No, sir.

CORNELIUS W. ROBINETTE, being sworn as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. BROWN:

Q. Mr. Robinette, where do you live?
A. Evanston, Wyoming.
Q. What is your business?
A. Well, car-repairer and car-inspector.

Q. For whom are you working?

A. U. P.

Q. How long have you been in the employ of the U. P.?

A. Well, I have been in the employ of the U. P. about fourteen years.

Q. How long have you been engaged in car-inspecting?

A. In car-inspecting, about seven years.

Q. What are the duties of a car-inspector?

A. Well, to look over a train when she comes into a station, and see that there is no—see that the car is able to run, in all respects; that is, the running parts of it.

Q. The running gear?

A. Yes, sir.

36 Q. What parts do you particularly examine and especially look after?

A. Well, the wheels; the wheels and the draw-heads, and trucks; that is, what we call the truck archers—truck frame.

Q. What is the process of inspection—what do you do to inspect a car?

A. Well, we have a hammer, and we walk alongside the train and first hit a wheel with the hammer, look at it at the same time, look all over the draw-head—that is, under the box and running gear, and frame; see that there is nothing broke or anything so as to disable the car from going; if there is, we shop it, or fix it right there; if we haven't time to fix it we shop it, and let it go to the shop and be fixed.

Q. If there is a crack in the wheel of that car, are you, by the eye and hammer, enabled to detect it usually?

A. Well, mostly by the eye.

Q. You put more reliance on the eye than you do on the hammer?

A. Yes, sir; my experience in wheel-tapping, there is very few cracks that is ever found by the hammer; the hammer is more—that I use it for, and my experience teaches me as I am pretty right, use the hammer—if I hit a wheel and she don't sound to exactly suit me, I inspect it a little bit closer than I would if it would ring like it ought to ring; and most of the cracks I have ever found I have found by the sight.

Q. Is there any difference as to the facility of inspecting a wheel, as to whether you inspect in cold, or when they first come in?

A. We generally inspect them when they first come in.

Q. Why?

A. Well, as a general thing, we are ready for the train as it comes in; if two trains follow one another we look over one and then keep on until we are through inspecting; if there is anything then, no matter what it is, that disables the car, we shop her, and that holds the car until such time as we get to fix it; they don't keep that car in another train to go out or don't keep her in the same train that she is in, to send her out.

37 Q. Is there any particular reason besides that, for any greater facility for finding cracks——

A. (Interrupting.) No, sir; nothing, only the eye.

Q. Well, can you tell any better when the wheel is hot or when it is cold?

A. No, sir.

Q. Makes no difference with regard to that?

A. Makes no difference; if the wheel comes in hot, and there is a crack in it, it will expand; of course any iron will expand.

Q. So it can more readily be seen?

A. Certainly, it can more readily be seen than when it is cold; when it is cold, if there is any grease on the wheel, the dirt, if the wheel is cold, you have to inspect pretty close; if there is a crack behind the grease, and the wheel ever has been hot since that grease has been on there, it will show a crack through the grease, and it shows plainer when it is hot than it will when it is cold.

Q. Does it take experience in learning to inspect a wheel properly?

A. I think it does; yes, sir.

Q. To what extent is that required?

A. Well, when I first commenced inspecting trains, I know—there has been men follow me and find cracks, what they called cracks, right after me, that I didn't find; at least I didn't think it was a crack.

Q. How long practice does it require of a man before he is a suitable car-inspector?

A. Well, I have been inspecting trains daytime, and I know the foreman, he would inspect one side and then come down on my side to see if I done it proper, about a year.

Q. Do you remember knowing or hearing of the accident which happened to Mr. Daniels, that wrecked that train?

A. Yes, sir; I was through that wreck.

Q. Where were you living at that time?

A. Evanston. I had been inspecting trains nights before this wreck—before this occurred at this time; at the wreck, some of my family was sick, I don't just recollect—I think it was my wife, and I asked for a change-off with one of the other men, so as to
38 be home with her, and I was working daytimes at this time, at the time of the Daniels wreck, as they call it, and being working daytimes, why, the day men had to go.

Q. They were ordered to the wreck?

A. Yes, sir; they were ordered to the wreck.

Q. You were ordered to the wreck?

A. Yes, sir; I was ordered to the wreck.

Q. About what time did you arrive there?

A. Well, as near as I can recollect—it has been a good while ago—I think we got there about 10 o'clock the next morning after the wreck.

Q. Who was working with you, if any one?

A. Who was with me at the time of going to the wreck?

Q. Yes.

A. Well, there was Mr. Bergstrom, he was our foreman at that time, and Mr. Larsen, and, I think, Charley Read, a fellow working there at that time; he isn't working there now—Charley Read. I

believe that was all the carmen that was there—Charley Read, Mr. Bergstrom and Larsen.

Q. You had laborers besides?

A. Yes, sir; we had other men there.

Q. I was going to ask you how much of a wreck it was—how many cars were jammed up?

A. Well, indeed I couldn't say, now, to be positive of it.

Q. What?

A. I wouldn't say positive how many cars there was; there was, I will say, nine or ten cars.

Q. Thrown off?

A. Yes, sir.

Q. Any of them broken up?

A. Yes, sir; there were several of them tore all to pieces.

Q. Track torn up any?

A. Yes, sir.

Q. So that it was quite a considerable wreck?

A. It was a pretty bad wreck.

Q. How long did it take you to clean the track and fix it in shape?

39 A. To clean the track so that trains would pass?

Q. Yes.

A. I think it was along that afternoon that we had the track so that the trains—that is, ruling cars off each side, and fix the track so that the trains could pass.

Q. How long before you got the debris all picked up?

A. Well, we was there a week, the Green River men and section-men, and carmen and ourselves—we was there a week.

Q. Did you at that time, on arriving there, make any examination as to the probable cause of this wreck?

A. Well, I merely asked—I asked what was the cause of it.

Q. Well, did you, or did you and Mr. Bergstrom, among you, go into an examination of it?

A. Yes, sir, we went to look at what was said to be the cause of the wreck, and that was that broken wheel.

Q. I ask you if you examined around the debris.

A. Yes, sir.

Q. For what you could find to be the cause?

A. Yes, sir.

Q. Not the examination of witnesses, but the examination of what you could see. After looking it all over, what cause, if any did you find——

A. (Interrupting.) Well, we found a broken wheel—a piece of broken wheel; there was several broken wheels; we found a piece of broken wheel that was supposed to be the cause of the wreck.

Q. Would such a break as you found on that wheel be sufficient to cause a wreck?

A. Yes, sir, there was about—well, I suppose, as near as I could say now, about a third of the wheel.

Q. And you found that and attributed it to that?

A. Yes, sir.

Q. Did you find any other cause that you thought sufficient cause?

A. Well, we found it had been cracked before; it was an old break of the wheel.

Q. Have you made, or caused to be made, a diagram of the wheel and the car as you remember it?

A. Yes, sir, I have.

40 Q. You and Mr. Winters made it, did you?

A. Yes, sir.

Q. Whereabouts was the piece of wheel lying that you attributed the accident to?

A. Well, that was laying side of the track; I don't know whether they call it north side or south side; right alongside of the track going east—south side, I believe they call it; the piece of wheel lay, as near as I can tell, where the wreck first started in, where the track first spread and tore up.

Q. How far from where the track spread and flew up?

A. Well, about, I should say, a half a car length.

Q. Now, with reference to the trains, could you tell what part of the train it was in?

A. Indeed, I could not, no, sir.

Q. Is this the little diagram that you had reference to?

A. Yes, sir, that is it; that is as near as I can tell.

Q. That is about where you think the break was, is it?

A. Yes, sir.

Q. So much of the wheel——

A. (Interrupting.) So much of the wheel was off; piece laid side of it; I think the crank may have come down across here, you know; may have cut up here closer; I think that is just as near as my recollection, the way it run.

Q. I presume you didn't preserve the pieces?

A. No, sir, I don't think they did; I don't know.

Q. You did not?

A. I did not, no sir; I never expected to see the wheel nor hear of it afterwards.

Q. Now, you said to the jury a while ago that it was an old crack.

A. Yes, sir.

Q. Won't you state what evidence you had of that fact, that it was an old crack?

A. Well, along through here (pointing), I won't say just how long, because I don't recollect where it broke off; you could see—this is a new break from here out, but from here down to

41 there you could see that there had been grease, had rust in there—had been broken off, so that there was grease and dirt and rust in there.

Q. That being an old crack, having grease in it, if it had been examined the day before at Green River by a competent car-inspector, could it have been seen?

Q. Certainly; yes, sir, I think so; there is nothing to hinder him from seeing it unless there was—well, there is no way to hide it all;

there could be part of it hid from inspection; there was no way to hide it all but what you could see it; that is my recollection.

Q. Did you say whether there was grease in the crack or not?

A. Yes, sir, grease and dirt had worked into the old crack; that is, grease and dirt, you know—dirty grease; I couldn't say whether it was dirt——

Q. That was one of the ways you had of determining whether it was an old crack or not?

A. Yes, sir.

Q. You say it had rusted?

A. Yes, sir.

The COURT: How much did you say, Mr. Robinette, was an old crack in that wheel, or break?

A. Well, I won't say positive how long the crack was—well, I will say twelve inches; that is my recollection; it has been a good while ago, and I paid very little attention to it; it was right across the bowl of the wheel.

Mr. BROWN: Does this that you have marked in red represent what you understand to be that part of the crack?

A. Yes, sir, that is the best of my recollection.

Cross-examination of CORNELIUS W. ROBINETTE.

By Mr. WILLIAMS:

Q. You say, in your experience with the hammer, that the hammer is not the best means or surest means of ascertaining cracks?

A. No, sir.

42 Q. Your experience has been to find them mostly by the eye?

A. By the eye, yes, sir.

Q. And in using a hammer in inspecting cars, you say that assists; if you find a wheel that, by striking it, does not sound right, you inspect it a little more closely?

A. Yes, sir.

Q. That sound is influenced by a variety of causes, is it not?

A. Well, several; the ring of a wheel——

Q. (Interrupting.) Suppose a brake is touching it, that would make a difference?

A. That would make a dead sound, if the brake was set.

Q. If the flange was setting snug up against the rail, that would make a difference?

A. That would make a little difference, yes sir.

Q. If a wheel was touched in any way by any object, or hugging the rail closely, there would be some difference?

A. Yes, sir, as a general thing, the only thing that will deaden the sound of a wheel is the brake-shoe; the flange won't make much difference, because it holds the train down that way; you walk along here, and you always hit it here, (illustrating); the flange down here, that hits the rail, is only about six inches; it don't make much difference about hitting the rail.

Q. Where do you usually strike, on the rim, with your hammer?
A. Yes, sir.
Q. That piece of broken wheel was lying beside the wreck, you say?
A. Yes, sir, beside the track.
Q. You don't know whether it had been moved before you got there or not?
A. No, sir, I don't know; I couldn't say.
Q. There had, as you understood, been examinations by others, and you went and looked at what you understood——
A. Yes, sir.
Q. —was supposed to have been the original break?
A. Yes, sir.
43 Q. I understood you to say there were several wheels broken there?
A. Well, there were several down in the wreck that were broken; yes, sir.
Q. How much attention did you give to the inspection of this broken wheel?
A. Well, we went up and picked up the wheel; that is, stood up on the edge and looked at it; examined it and laid it down.
Q. Did you fit the broken wheel into its place?
A. No, sir, did not; just let it lay there.
Q. Where was the larger piece?
A. Well, I didn't know.
Q. You didn't see that?
A. I don't know as I saw it; don't know as I did, don't know but I did; I might have seen it.
Q. You don't remember now that you did see it?
A. I don't remember now that I did see it.
Q. Your only remembrance is in examining the smaller piece that was broken out?
A. That is all; you couldn't tell anything about the bigger piece, neither, because it was all mixed up with kerosene and dirt, amongst the wreck.
Q. So you paid no attention to that?
A. Paid no attention to that; no, sir.
Q. I understand you to say you are not positive as to this being the proportionate length, if this was the entire wheel—is this drawn to the scale of a wheel, thirty-three inches?
A. That wheel is thirty inches.
Q. Thirty inches and thirty-three inches are about the sizes of wheels?
A. Yes, sir.
Q. This is thirty inches in diameter, eh?
A. Yes, sir.
Q. I understand you to say that this accurately represents the extent——
A. (Interrupting.) Well, as near as I can tell now; as near as I can tell at the present time.

44 Q. From your remembrance, that would be so, eh?

A. Yes, sir; it has been a good while ago—a year ago last April; I never expected to hear of it afterwards, and therefore I haven't thought about it since until now.

Q. You gave, then, not that particular attention to it——

A. No, sir.

Q. —that you would have done if you supposed your attention would have been called to it again?

A. No, sir; and I don't suppose that I would ever see the wheel anyhow; Mr. Bergstrom being my foreman at that time; he called my attention to the wheel.

Q. You think it was he who called your attention to it, or you wouldn't have noticed it?

A. No, sir; that is, not to pay any particular attention to it.

Q. You went there with a gang for the purpose of clearing the wreck?

A. For the purpose of clearing the wreck; yes, sir.

Q. About what depth was the indication to you, of the old crack?

A. Well, I should say about—through the bowl, just about through the plate—double plate.

Q. That is, an outside plate and an inside plate?

A. Yes, sir; it was through the outside plate.

Q. And those plates joined together about the same distance from the axle?

A. Yes, sir.

Q. About this point? (Pointing.)

A. About here.

Q. Around in here is where they joined together?

A. Yes, sir; just over the bowl.

Q. Then those two plates diverge, one to the outside of the rim and the other to the inside of the rim; that is the usual construction—they are cast in double plates?

A. Yes, sir.

Q. And this old break was about inside of the line of attachment of the two plates, was it?

A. Yes, sir.

45 Q. The outside plate of that wheel—was it smooth?

A. No, sir. Well, now, I won't say——

Q. (Interrupting.) What I am calling your attention to is this: On one side of the plate I have noticed the wheel is corrugated—the inner side?

A. Yes, sir.

Q. And on the outside it is plain?

A. Yes, sir.

Q. Curving outward to the rim?

A. Yes, sir; it was one of those kind of wheels.

Q. Does that corrugation make any difference in the sound of a wheel, striking it inside or outside?

A. Well, they hardly ever strike a wheel on the inside; at least I never do.

Q. You have never noticed then, whether there is a difference in the ring?

A. Well, I have struck wheels on the track, walking alongside, getting down, looking at a train—while standing, I have hit them on the tread side, instead of on the flange side.

Q. There is a difference in the sound, isn't there?

A. I believe there is.

Q. But you are not very familiar with that difference?

A. No, sir; I am not allowed to do that, because we will knock the flange off.

The COURT:

Q. Not allowed to do it, why?

A. Liable to knock the flange off—hit it on the flange side.

Mr. WILLIAMS:

Q. What character of work had you engaged in railroading before you began inspecting cars?

A. Car-repairing.

Q. Working about the shops?

A. Yes, sir.

Q. Ever oil any before?

A. Yes, sir, I have oiled.

Q. Before inspecting?

46 A. Yes, sir; I went over on the top of the cars, to inspect the bridges—I done that pretty near a year and then had to go — top of the bridge—go up on top of the cars as they were coming in; then go down on the side and put on oil-box bolts—then have none I think; I have done that.

Q. Working at car repairing and oiling and assisting about *about* the shops——

A. Yes, sir.

Q. —is usually a kind of apprenticeship to inspecting, is it not?

A. Well, some had rather do that than to inspect; some have worked at car-repairing longer than I have, and still work at car-repairing.

Q. But usually a man, before he is put to inspecting——

A. (Interrupting.) Yes, sir.

Q. —has some familiarity about a car, does he not?

A. Yes, sir.

Q. Running gear, wheels and so on?

A. Yes, sir.

Q. Either by oiling or working with them in the shop, and so on?

A. Yes, sir.

Q. And you had been doing such work as that before you began inspecting?

A. Yes, sir.

Q. How long did you say you had been inspecting now—about seven years?

A. About seven years, yes, sir.

The COURT:

Q. Is the car wheel more likely to break when the train is going down grade?

A. How is that?

Q. Is the car wheel more likely to break when a train is going down grade than it is in any other place?

A. Well, I don't know as it is; they have as many wrecks on level ground as they have on hills, ever since I have been in this country.

47 Mr. WILLIAMS:

Q. Mr. Robinette, I understood you to say when the wheel is hit, if there is a crack on it, the expansion of the wheel from heat will show the crack very much plainer than when it is cool?

A. Yes, sir.

Q. And your sounding by hammer is not a certain test, by any means, of the extent of the crack?

A. No, sir.

Q. If there is any dirt or grease upon the wheel, and the wheel is cool, why, a crack, although existing, may be overlooked after pretty close search, may it not?

A. Well, it might, yes, sir; I don't say they can all be found, no, sir.

Q. You don't say that?

A. I don't say they can all be found.

Q. Is it not your experience that with a hot wheel, a crack will open so that you can see it distinctly, and stick an ordinary knife blade into the crack?

A. Some does, according to how long the crack is.

Q. Then afterwards, the wheel becoming cold that will close up, will it not?

A. Yes, sir; but still——

Q. (Interrupting.) So that it is difficult to see it?

A. Yes, sir, but if there is any grease there—grease in the crack, will show plainer behind the grease, on a cold wheel.

Q. That is, you can see the line of demarcation in the grease?

A. Plainer than you can if you scrape off the grease.

Q. How would that be if the car had been running some time, and the grease from the box had run over it, without being hot; of course wheels only ordinarily heat, do they, if they are in good condition?

A. Well, if you set a brake on it will warm it up; it isn't the heat from the journal that will make the wheel expand; it is heat from a brake.

Q. Suppose, after a wheel had been running some distance in dust and so on, and not being heated so as to show that when
48 it came in, might not the recent collection of dust on the oil there entirely obscure the crack?

A. I have never found one that way; I have always found them, that the crack would show through; it wouldn't make any differ-

ence how long they would be cold; let them stand for twenty-four hours, and then the crack will show pretty plain through the grease.

Q. How would that be if they were running and collecting fresh dust on there, so as to hide the crack?

A. I have never tried in that way; if I found a crack I wouldn't let it go again.

Q. Under the conditions I state, you can't tell how many wheels would pass muster with you?

A. No, sir, I couldn't say about that.

Redirect examination of CORNELIUS W. ROBINETTE.

By Mr. BROWN:

Q. How old a man are you?

A. I am 37 years old.

Q. This piece that you found, that you attributed the accident to, where was it as to being in the ground—was it embedded?

A. No, sir; it laid up in a cut; the wreck first started in the mouth of a cut, and this piece of a wheel laid right up against the bank.

Q. How far from the track?

A. Well, I should say six feet.

Q. Was there any indentation in the bank, as if it had been thrown to it?

A. Yes, sir; you could see the place where it struck.

Q. A little place there?

A. Yes, sir.

Q. Who else looked at it besides you?

A. Well, Mr. Burchell was there, and I wouldn't be positive—I ain't going to say to be positive, I think Mr. Lindsley and the foreman up there, O'Neill, and I don't remember who else; those two gentlemen I think were there.

49 Q. Mr. Lindsley is the agent here for the company?

A. Yes, sir; I think he was there, and I think Mr. O'Neill; I wouldn't be positive about anybody else, but I think to be sure they was there; and Mr. Bergstrom and myself.

Q. Valero—you didn't say Valero was along?

A. He might have been there; I don't say he was.

Q. This was a crack you think could have been discovered if examined?

A. Yes, sir.

Q. One that ought to have been discovered?

(No response.)

Recross-examination of CORNELIUS W. ROBINETTE.

By Mr. WILLIAMS:

Q. Who is Mr. Valero; the station agent?

A. I think he is.

Q. You are not sure he was there?

A. I am not positive; no.
Q. Mr. Lindsley was there when you first got there?
A. He was; yes, sir.
Q. Where this piece of wheel was lying—you say it was imbedded, as though it had been thrown——
A. (Interrupting.) The ground was hard; you could see where the piece of wheel struck the ground, and just flopped over.
Q. And was lying apparently near the place where it struck?
A. Yes, sir.
Q. You don't know whether it had been handled and examined before you saw it, or not?
A. No, sir.

50 Dr. J. M. BENEDICT, being sworn as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. BROWN:

Q. Doctor, where do you reside?
A. In this city.
Q. What is your business?
A. Physician and surgeon.
Q. Where did you graduate as a surgeon?
A. New York university, medical department.
Q. How many years and what experience have you had as a surgeon?
A. About twenty-five; very close to it.
Q. Whereabouts?
A. Part of the time in New Jersey, part of the time in New York, and the balance of the time here.
Q. Have you seen this young man here, the plaintiff, Mr. Daniels?
A. Yes, sir.
Q. When did you see him first?
A. I saw him twice; I saw him some time—I wouldn't venture to say; nearly a year ago, and then this week.
Q. At the first time, state whether you made a critical examination of the injuries from which he is now suffering?
A. Yes, sir.
Q. And this week, how much of an examination did you make of him?
A. I made a thorough examination; stripped him and examined him.
Q. Stripped him naked?
A. Yes, sir.
Q. Won't you tell the jury with what troubles he is afflicted now, what injuries he has, and where, and how they affect him, and all about the injuries, and each one?
A. Well, perhaps it would be as well to begin with the right shoulder?

51 Q. Yes, sir.

A. There is a dislocation of the—I hate to use these technical terms, but I am afraid I will have to—of the shoulder end of the collar-bone; it is known as the acromial end of the clavicle, or sometimes called by authorities a dislocation of the shoulder, or the shoulder-blade, from the collar bone; either way, it doesn't matter; it is a loosening of the outer end of the collar-bone; it is controlled largely by powerful muscles, and is an important factor in the use and motions of the shoulder-joint. The other injury was a fracture of the left——

Q. (Interrupting.) Wait a moment. Before you go to the other injury; what is the effect of this injury that you have already described, to the shoulder?

A. To very largely diminish the use of the member.

Q. What member?

A. The arm.

Q. The arm and hand. Go on to the next injury which you discovered.

A. The next injury was an oblique fracture of the left thigh, involving about the middle portion of it, about three inches in extent, with about three inches shortening of the leg, and perhaps two and a half to three inches displacement—what I mean by that is a bending of the leg; the point of the upper fragment is well marked, being on the outside of the leg; the point of the lower fragment is not so readily distinguished. There was complete union at the time that I saw it, and there was the other day. But you have a shortening of the leg of about three inches; it is almost impossible to measure that to a quarter of an inch, but it is close to it.

Q. What is the effect of that injury upon him?

A. Permanent lameness and deformity.

Q. What other injuries did you find,—as to the other leg, did you find anything on that?

A. No, sir.

Q. Now, all these injuries, what is the effect upon him, as to rendering him fit for work?

52 A. Well, for manual labor—for heavy manual labor, it would render him permanently unfit for it.

Q. Any of these difficulties such that he can overcome them—either of these injuries?

A. No, sir.

Q. Can this shoulder ever be cured in any way?

A. No, sir.

Q. Or this leg?

A. No, sir.

Q. Injuries for life, are they?

A. Yes, sir.

Cross-examination of Dr. J. M. BENEDICT.

By Mr. WILLIAMS:

Q. I understand you to say, Doctor, that there was a dislocation of the shoulder end of the collar-bone, is it, or the clavicle?

A. Yes, the collar-bone; sometimes it is called dislocation of the acromial end of the clavicle; other authorities choose to call it a dislocation of the shoulder-blade from the clavicle; it is a matter of no consequence.

Q. The shoulder-blade and the clavicle unite there?

A. At the acromial end of the clavicle.

Q. And you say that dislocation causes a weakness in the use of the arm—a lessening of the power of the muscles there attached?

A. Yes, sir, and of the power of the arm generally.

Q. And you say that is permanent?

A. Yes, sir; it is a matter that I don't consider—don't know of any authority that speaks of its cure. It is almost an absolute impossibility, from the peculiar character of it, to keep it still. Then the rupture of those strong ligaments that hold it, being fibrous tissue, they never unite anyway; precisely like a dislocation of the shoulder-joint, when it once breaks through, it is never the same joint again.

Q. So that the use of his arm for heavy manual labor is permanently impaired?

A. Yes, unquestionably.

53 Redirect examination of Dr. J. M. BENEDICT.

By Mr. BROWN:

Q. Why cannot this shoulder ever be set or replaced in any way?

A. It can be.

Q. The shoulder can be replaced and put back as good as it was?

A. Yes, it can be put back there.

Q. Will it remain there?

A. No, sir; you can't keep it there; it is an absolute impossibility.

Q. Why not?

A. For the very reason, you can't control it, and if you could control it, you won't get any of that white fibrous tissue.

Q. In other words, it is constantly being dislocated over again?

A. It is constantly on the move, just as much as the shoulder itself, on account of those strong tissues being disunited.

Q. Are these injuries of such a nature as to cause suffering and pain hereafter?

A. Yes, sir, for a time.

Q. At times they will cause suffering and pain?

A. Yes, sir, the same as any old injury would.

OLE BERGSTROM, being sworn as a witness in behalf of the plaintiff, testified as follows:

Direct examination.

By Mr. BROWN:

Q. Where do you reside?
A. In Evanston.
Q. Are you in the employ of the Union Pacific Railway Company?
A. No, sir.
54 Q. Have you ever been in the employ of that company?
A. Yes, sir.
Q. When did you cease?
A. I think last June.
Q. What is your business at the present time, Mr. Bergstrom?
A. House-building and contracting.
Q. What had been your business for the Union Pacific Railway Company while you were in their employ?
A. Well, I was working at several different things; the last six years I was employed for them, I was in the car department.
Q. In the car department. Within the scope of your employment, was the car inspecting included?
A. Yes, sir.
Q. What was your position as car-inspector?
A. Well, I had charge of the men, preparing cars, and inspecting cars.
Q. You was foreman?
A. Yes, sir; had charge of the men at the repair shops.
Q. How many years were you in the employ of the company in all—the defendant company?
A. Since 1871.
Q. How many years' experience have you had as a car-inspector and examiner?
A. Well, I ain't really had much experience in inspecting cars, although I have had charge over men the last five years.
Q. Do you remember the occasion of what is known as the Daniels wreck, in the spring of 1887?
A. Yes; we called up there to help clean the wreck off.
Q. Where were you then?
A. At Evanston.
Q. And you were there to the wreck?
A. Yes, sir.
Q. Do you remember what time you arrived at the wreck?
A. I don't exactly remember, but I think we passed Carter at seven o'clock in the morning; according to that, we reached the wreck about 8.30.
Q. How much of a wreck was it?
55 A. Well, there was—I don't remember certainly, but there was a dozen cars or so, I think.

Q. Piled up, eh?

A. Yes.

Q. Track torn up?

A. The track was torn a little, not a great deal.

Q. How long did it take you to clear it so that the trains could pass?

A. It was the same day in the afternoon, some time after 12 o'clock at least, that the trains passed.

Q. And how long before you got the debris of the wreck cleared off?

A. Well, I think there was four or five days, probably, before we got the wreck cleared; I don't remember exactly.

Q. Did you make any examinations as to the probable causes of this wreck?

A. No, nothing else but when we first came there, we inquired what caused the wreck, and there was—speaking about there, it was a cracked wheel, a broken wheel, that done the wreck; I went up to see the wheel and I seen a part of a wheel lying on the south side of the track there—well, on the east end of where the cars was piled up, part of a wheel, and that was supposed to be the cause of the wreck, although I don't know if it was or not.

Q. Well, did you find any other cause?

A. No; couldn't see any other reason; I didn't hear anybody express their opinion about anything else, nor I don't—couldn't see nothing.

Q. Would such a break as that in a wheel be sufficient to wreck a train that way?

A. Yes, if the wheel broke and made the wreck, it was sufficient.

Q. It was sufficient if the wheel broke?

A. If the wheel done—that is, if the wheel broke before the wreck, it was enough to make the wreck.

Q. Did you examine that crack in that wheel?

A. I did partly examine it.

56 Q. What was the appearance of the crack, as to whether it was old or new?

A. Well, the biggest portion of the piece that was out of the wheel was a fresh crack, but the outside plate—part of the outside plate was an old crack—that is, old enough so that the grease had saturated in—had saturated into the crack.

Q. Grease worked into it and showed it was an old crack, eh?

A. Yes, part of it, but the biggest portion of the piece that was cracked out was fresh broken.

Q. Where is the inspecting station next east of this Bryan place?

A. Green River.

Q. Did you know as to the make-up of trains at Green River at that time?

A. No, I don't know anything about it.

Q. When should a wheel be examined, when it first comes in or after it has stood awhile?

A. Well, it is customary to be on hand and examine the train when the train arrives at stations.

Q. Was this crack such a one as could have been detected with the eye?

A. Well, I suppose they could if they had got onto it, but it is hard telling, if the inspectors did or not, or if anybody could; I suppose if they got their eye on it it would have been seen.

Q. That is what I want to know of you; is it such a one as could have been detected?

A. Oh, it was——

Q. (Interrupting.) If the inspector had carefully examined the wheel?

A. If it was big enough or long enough to be visible—that is, from the outside.

Q. If he had examined it with sufficient care, he would have detected it, would he—the inspector?

A. Well, I don't know; I am no inspector myself; I don't know really, how that would be.

57 Q. You are the foreman of inspectors—not an inspector, but the foreman of them?

(No response.)

Cross-examination of OLE BERGSTROM.

By Mr. WILLIAMS:

Q. What you mean to say is that personally you have never been engaged in the business of car-inspecting yourself?

A. No, sir.

Q. That is, you have never been an inspector of wheels?

A. No.

Q. What is the character of your trade or business?

A. Well, carpenter.

Q. And you were in charge of a car department, and had men under your direction?

A. I was at that time.

Q. And they usually have a foreman of inspectors, don't they—a man that goes with the inspecting gang, as one of them, that kind of has charge—isn't that usually the case?

A. No; not there at Evanston they don't; there is two inspectors daytimes and two at night, and these two——

Q. (Interrupting.) These two go and work together?

A. Yes; of course in the daytime there might be somebody, maybe, around at the time, helping them.

Q. You say there was a part of the outside plate of this wheel that showed an old break—crack?

A. Yes.

Q. Grease, and dirty grease, worked into the crack?

A. Yes.

Q. But the most part of the break was fresh?

A. The inside break was all fresh.

Q. The inside plate was all fresh?

A. The biggest part of the casting, that was broke.

Q. And there was a portion on the outside end of each plate that was fresh broken?

A. Yes, sir.

58 Q. Not being an inspector yourself, you haven't observed the effect of heat upon a wheel, as to the opening of a crack, or anything of that sort, particularly, have you?

A. Well I have seen, when a wheel is warm, it expands and shows the crack better than when it is cold; it will close together when it is cold.

Q. So that when it is cold the crack will close up pretty close?

A. Yes, sir.

Q. You have noticed that, I suppose, in the car department?

A. Noticed that frequently in changing wheels; come down to the shop, when they are warm, of course the crack shows; when they stand in the yard and get cold, before they come down there, sometimes the crack can be hardly seen.

Q. Did you pay any particular attention to that broken piece of wheel?

A. No, not more than ordinary; otherwise as I would.

Q. Do you remember about the shape of the piece that was broken off?

A. I do not for certain, remember the shape of the piece.

Q. Can't state whether that about represents it or not? (Pointing to diagram.)

A. Well, that I can't say; it seems to me—although I won't state positive, but it strikes me that the crack went a little more that way (indicating), but that I wouldn't say for positive, because I don't remember.

The COURT:

Q. How deep was that crack?

A. Well, it went through the first plate; the car wheels are two thicknesses of plates, and there is an opening between them.

Q. How much in inches—how deep was it in measuring?

A. Well, how deep is the plate?

Q. Yes, how deep is the wheel—or the crack?

A. Well, the whole plate—the half of the wheel——

Q. State the distance in inches, or parts of an inch, or otherwise.

Mr. WILLIAMS: The depth of the crack.

59 A. The length of it?

Mr. BROWN: What you asked would answer it—the thickness of the plate?

A. The thickness of the plate is about—well, it is from three-quarters of an inch to an inch and an eight-, I should judge, along there; I wouldn't be certain, but I think that is the thickness of these plates.

Mr. WILLIAMS:

Q. You can't be certain as to the thickness?

A. No, I can't be certain as to the thickness, but I think that plate is thicker some places than others; there are brackets cast in

between these places, and sometimes the plates is a little heavier than others.

Q. Then these plates consist of two cast plates?

A. Yes, sir.

Q. They have a line of junction around here, some distance out from the axle, do they not?

A. Yes, sir.

Q. The plates come in together, and then separate again, one coming out to the outside of the rim, and the other to the inside of the rim; isn't that the case?

A. Well, here (pointing) they are hollow.

Q. Next to the axle?

A. Yes, from the core; then comes the hollow.

Q. Between the two plates?

A. Yes.

Q. And then some distance out those two plates incline together?

A. Yes.

Q. And they are attached together?

A. Yes, sir.

Q. Didn't this line of break tend toward following the line of junction of the two plates, the outer and inner plate, a little more as represented here, or don't you remember?

A. I couldn't be positive about the shape of the crack.

Q. Do you remember about what length in inches the old crack was?

60 A. No, I don't remember that, but it was—I don't remember that exactly, but it was——

Q. (Interrupting.) And you think the break extended through the outer plate?

A. Yes.

Redirect examination of OLE BERGSTROM.

By Mr. BROWN:

Q. When you speak of it being through the outer plate, do you mean the rim or do you mean the two plates?

A. Two plates.

Q. The two plates, side by side, like that (indicating)?

A. Yes.

Q. And the outer is the one that would be on the outside of the car?

A. Yes, sir.

Q. Not inside of the track?

A. No.

Q. Then it is one which an inspector would approach if he was on the outside?

A. Yes, sir.

Q. And the old crack was clear through that outer plate?

A. Yes, sir.

Plaintiff rests.

Thereupon the court took a recess until 2 o'clock p. m.

MONDAY AFTERNOON, NOVEMBER 26TH, 1888.

Mr. WILLIAMS: The view that I take of these pleadings entitles the defendant to a nonsuit, and I desire to present in a moment that view to your honor.

I move a dismissal on the ground that there is no testimony to go to the jury at all upon the matters of negligence constituting the plaintiff's cause of action. After a general averment of negligence, I take it the gist of this case, the specification of the facts—
61 matters which constitute the alleged negligence, and on which the plaintiff relies—are properly pleaded in this case, and it is to this effect: (Reads from complaint.) There is no proof that there was an incompetent inspector there, or an inadequate number of inspectors.

(After argument by counsel.)

The COURT: I will deny the motion to dismiss the complaint, and give the defendant an exception.

Mr. WILLIAMS: We will take an exception.

Defense.

EDWARD A. LINDSLEY, being sworn for the defense, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside, Mr. Lindsley?
A. Green River, sir.
Q. In Wyoming?
A. Yes, sir.
Q. What is your business at the present time?
A. General foreman of the Union Pacific shops at Green River.
Q. What is the purpose or object of these shops? Give the jury a general idea, briefly, of what their duties are there.
A. For the repairs—these shops are used for the repairs of engines and cars.
Q. Running on the defendant's road?
A. Yes, sir; the car department.
Q. How long have you been engaged in that position?
A. Something over seven years.
Q. Are you a mechanic, originally, before railroading?
A. Yes, sir.
Q. What species of mechanic?
A. A machinist.
Q. A machinist?
62 A. Yes, sir, and engineer.
Q. That involves the working in iron, does it?
A. Yes, sir.
Q. How long have you been engaged in railroad work of different sorts, if you have been engaged in different kinds of railroad employment?
A. About twenty-five years.

Q. What different capacities?
A. All capacities.
Q. Name the principal ones, if you please?
A. I have been employed as a brakeman.
Q. With hand brakes, eh?
A. Yes, sir, as fireman, as machinist, as engineer, and my present occupation.
Q. Have you been a locomotive engineer?
A. I have.
Q. For what length of time have you engaged in that service?
A. About twelve years.
Q. About twelve years, on what road?
A. Union Pacific.
Q. What portions of the road—I will confine it, have you been engaged as a locomotive engineer between Green River and Ogden?
A. Yes, sir.
Q. For about how long on that division?
A. About twelve years.
Q. That was where you were engaged as locomotive engineer?
A. Yes, sir, most of the time.
Q. You are acquainted with the road, then, between these points?
A. Every inch of it.
Q. Its grades, etc.; I will ask you to state whether or not you are familiar with the locality where this wreck occurred?
A. Yes, sir.
Q. Had been previous to the occurrence of the wreck, as engineer, had you?
A. Yes, sir.
63 Q. You may state to the jury whether or not you were present at that wreck.
A. I was present a few hours after the wreck occurred.
Q. About what time in the day or night did you arrive at the site of the wreck?
A. Somewhere in the neighborhood of midnight; couldn't tell the exact hour.
Q. From what point did you go?
A. Green River.
Q. You may state to the jury whether or not you made any examination of the wreck—debris there, to inform yourself as to the probable cause of the wreck.
A. Yes, sir, we made a——
Q. I will ask you to state what the general character of the wreck was, and what you discovered, if anything, in the way of breakages?
A. We discovered a broken wheel that we considered caused the wreck.
Q. You concluded that was the probable cause, eh?
A. Yes, sir.
Q. Well, sir, did you find a piece broken—detached from the axle?
A. Yes, sir; not from the axle, from the other portion of the wheel.

Q. It hadn't broken into the axle?
A. No, sir.
Q. Where did you find that piece, with reference to the wrecked cars?
A. With reference to the truck it belonged to, it was a few hundred feet east in a cut.
Q. In a cut?
A. At the edge of a cut.
Q. And on which side of the track?
A. On the south side of the track.
Q. Were you able to discover what truck it belonged to?
A. Yes, sir.
Q. By what means?
64 A. By the build of the truck.
Q. There were other opportunities, then, to discover what truck it belonged to?
A. Yes, sir.
Q. And you ascertained that fact?
A. Yes, sir.
Q. Well, what is there about the build that enables you to determine that?
A. The build of the truck has the owner's name, or the company's, cast on the various castings of it.
Q. Including the wheels?
A. No, not the wheels. The shape of the break would show where the piece belonged—what wheel it belonged to.
Q. And you discovered that——
A. Yes, sir.
Q. —that by the shape of the break?
A. Yes, sir.
Q. And where the match was?
A. Yes, sir.
Q. If you are able to, I wish you would state what kind of a car it was that this wheel belonged to.
A. A Chicago & Milwaukee—box car, a new one.
Q. Box car, Chicago & Milwaukee—Chicago & Milwaukee Railway car, eh?
A. Yes, sir, Chicago, Milwaukee & St. Paul.
Q. If you are able to from your knowledge, Mr. Lindsley, you may state whether or not, in railroad operation, it is usual for cars of one railway company to pass over the line of another railway.
A. Yes, sir; it is a daily occurrence.
Q. In the course of traffic?
A. Yes, sir.
Q. You may state to the jury whether or not you made at the time a careful inspection of this broken car wheel?
A. I did.
Q. You may describe to the jury its appearance from the
65 break, describing the line of fracture as near as you can, and the appearance of the different parts of the break.
A. Well, it is purely from remembrance; my remembrance is that

the outside plate—the break in the outside plate of the wheel was something in this shape (indicating). The break on the inside plate of the wheel was very similar to this (pointing to diagram). There was no old crack on the inside plate; the outside showed a crack.

Q. And the line of crack in the outside plate was——

A. (Interrupting.) The line of crack in the outside plate, as near as my remembrance is, run very nearly with the line of connection of the plates, outside and inside plate.

Q. Describe to the jury the general construction of those wheels, with reference to those plates.

A. Well, they are cast with a solid cast hub, and an inside and an outside plate, which unites up several inches from the axle.

Q. That is, they incline toward each other?

A. Yes.

Q. And there unite?

A. Yes.

Q. And then what course do they take toward the rim of the wheel?

A. They run in one plate up to the rim of the wheel.

Q. Oh, they run in one plate?

A. Run in one plate up to the rim of the wheel.

Q. But those two plates are distinct castings, are they?

A. Yes, sir; well, they are not cast separate, they are cored; it is a cored casting.

Q. Describe what you mean by cored castings.

A. It is a casting that is cored by filling with sand, causing two plates to unite at intervals.

Q. Then this filling of sand only fills a portion of the space between them, and allows the plates to come together at intervals?

A. Yes, sir. I have a rough sketch here of the cut of a wheel.

Q. Does that illustrate——

A. That would illustrate those two plates. Here is the hub
66 of our wheel; here is the core; this is what we call the inside plate of the wheel, and this the outside; this is the rim of the wheel.

Q. And this core is a hollow space?

A. Hollow space, between the two plates.

The COURT:

Q. Allowing for the sand in the mould?

A. Yes, sir. This is a bracket—what we call the bracket, inside of a wheel; these marks here represent—there are a series of those corrugated——

Mr. WILLIAMS:

Q. That represents a cross-section, then?

A. Yes, sir.

Q. You may take that and explain what you have just stated to the jury; show them the interior structure.

A. Here is a wheel cut in two, joined in the center; one of our

cast car wheels; the hub is a solid cast hub, and these are what we call the inside and the outside plate; this mark here denotes a bracket—what we call a bracket or a corrugation, on the inside of a car wheel; this is our flange, and this the rim of the wheel; this crack that I speak of occurred on the outer portion—this is the outside rim of the wheel, which is shown on that sketch there, and this crack occurred right here.

Q. Extending to the core?

A. Yes, sir; on the outside plate.

Q. Now, if you made such examination, you may state to the jury further and completely the character of this break, the extent of the old crack.

A. Well, I am not prepared to state the length of that crack; my memory serves me, that it was in the neighborhood of six inches, or nearly one-quarter of the way around the wheel on the outside plate.

Q. On the outside plate?

A. That is, one-quarter of the way around the hub of the wheel—six inches would carry it—five to six inches would carry it nearly around.

Q. And as I understand it, as you remember it, the old crack curved in what way?

A. It had a tendency to curve in towards the axle, the least bit.

67 Q. Along the line of attachment of the two plates outside of the core?

A. Yes.

Q. Then indicate to the jury there the direction, as nearly as you remember it, of the breaks outward to the rim.

A. Well, they were very similar to that sketch, although I should say that they took in a little more of the wheel than that cut represents—sketch.

Q. And with the exception of the old crack which you have described, what was the appearance of the rest of the break?

A. Good sound material.

Q. And with reference to the time of the break?

A. New break?

Q. New break.

A. Yes, sir.

Q. Have you ever inspected wheels that were defective, in the course of your business?

A. I have never been employed as a car-inspector, sir, but I have inspected a great many wheels—defective wheels that were brought to my notice by car-inspectors that I have had charge of.

Q. So you have examined defective wheels?

A. A great many.

Q. In the course of your business, I wish you would state if you have observed, in that regard, what the effect of heating is with reference to cracks in wheels.

A. Owing to where the heat exists.

Q. Well, sir, you may indicate the effect from different sources of heat, and where the heat is, if you have——

A. (Interrupting.) A crack such as this was shown to be—the heat of an axle would heat—heat—what we call a hot journal, would heat the hub of the wheel, and it would tend to close that crack.

Q. That would have a tendency to close that crack?

A. Yes, sir; I should say so; if the heat was caused by the friction of the brake it would be the reverse.

Q. Explain that to the jury, if you please.

68 A. Why, if the rim of that wheel is heated quickly it will expand and open any crack or fracture that might be in the wheel.

Q. And what has been your opportunity to observe cracks in wheels similar to this, or cracks existing in the plates of wheels when the heat was from the outside of the wheel or rim?

A. Well, my opportunity for examination of those cracks was quite extended.

Q. And what was the result of you——

A. (Interrupting.) I was located at the time at Echo, in the same position that I hold now, at the foot of a twenty-four-mile hill, where we had to set car-inspectors on purpose to pick out cracked wheels that came in there hot from that grade; we used to find them very often——

Q. (Interrupting.) You say they used to come in hot; was that the rule of their coming in there?

A. They were not excessively hot, if the brakes hadn't been left on too long.

Q. Well, what was the fact in your experience there, as to their frequently coming in hot?

A. Well, if there was a crack in the wheel we could discover it, providing it was "het."

Q. And you had a great many cracked wheels, as I understand it?

A. Quite a number.

Q. How long where you at that point, engaged in that place on the road?

A. In the neighborhood of three years.

Q. That is, at the foot of a hill twenty-four miles long, you say?

A. Yes, sir.

Q. Well, now, explain to the jury, in a wheel that contains a crack, what is the result of observation of it at a time when it is hot, and when it is cold, if you have noticed any difference?

A. Why, at the time when the rim of the wheel is hot, the crack is open, so that it can be easily observed with the eye; I have seen them so that we could shove a knife into them, and the next morning, after they got cold, you couldn't find them.

69 Q. You have observed that in your experience?

A. Yes, sir.

Q. In your experience in railroading, are you able to state about what distance, where brakes are tightly applied, it will take for a wheel to become heated to a considerable degree—what length of run?

A. Depends entirely upon the leverage that the brake has got.

Q. Of course, if it is set tight—almost as tight as the wheel will turn under, I suppose the heating is much more rapid than——

A. (Interrupting.) Certainly.

Q. —if there is less pressure. Are you accquainted with this Peru hill, on which this wreck occurred?

A. Yes, sir.

Q. State if you have ever run trains over there as engineer.

A. I have, a great many times.

Q. In your experience in the operation of brakes, does it include the application of steam for braking?

A. No, sir; air.

Q. Air, applied from the engine. What are the comparative results in the application of hand brakes and air brakes, as they are used, with reference to heating, if there are any different results?

A. Air brakes, properly adjusted over an entire train, give an equal heating—give an equal friction to every wheel on train—they should; therefore they cause a great deal less heat to wheels than though the train was held with a few brakes—where the pressure is brought upon a few cars.

Q. I wish you would state, Mr. Lindsley, if you are able to from your experience in handling trains, your knowledge of the grade of this hill where this wreck occurred—what, in your judgment, would be the result of holding a train, such as the plaintiff described here, of twenty-five cars with six or seven cars with the brakes applied, with reference to heating of the wheels?

A. Well, I should judge that if seven brakes were used to hold that train—set tight enough to hold it within a reasonable rate of speed, there would be pressure enough to cause considerable heating—friction to the wheels.

70 Q. Would that, in your judgment, be sufficient to have heated those wheels to a very considerable extent, from the top of the hill down to the point of the wreck?

A. Yes, if they were—if the brakes were left set continually from the top of the hill down.

Q. What would be the effect, if you are able to state, upon the wheels, as to liability to break by becoming heated to any considerable extent?

A. An overheated wheel—heated on the outside rim, is very liable to burst.

Q. Have you had any opportunities to observe such cases in the course of your experience?

A. I have.

Q. More than once, or frequently?

A. Yes, sir.

Q. Or in several instances?

A. Yes, sir.

Q. I wish you would state whether or not, within your observation has fallen any case of wheels of bursting without defects that were discoverable, or apparently sound wheels, from such cause, so far as you are able to.

A. It would be hard for me to give days—impossible for me to give days and dates for any such thing, but I have seen several wheels—comparatively new wheels, and new brakes, burst when it was conceded by all those who had any opportunity to judge that it was caused entirely from overheating.

Q. From outside friction?

A. Yes, sir. This company has a precaution to that—this company has a set of car-inspectors at Granite Canyon, on Sherman hill, for that purpose now.

Q. That is about the heaviest grade on the road, is it?

A. Yes, sir.

Q. A set of inspectors for what special purpose?

A. Special purpose of examining the wheels of all eastward-bound trains going down that hill; all trains have to remain there twenty minutes to let the wheels cool; the hill is such an extent that they found it unsafe to run even air brakes down there without
71 stopping to give them a chance to cool; they very often have broken wheels between Granite Canyon and Cheyenne.

Q. Is there anything in your observation and experience, in connection with the use of air, where you equalize the application of the pressure and therefore lessen the heat, as you have stated, and the application of hand brakes, as to the frequency of the braking of the wheels; does your obsereation tend to give you any information upon that point?

A. I don't know that I understood the question thoroughly.

Q. In your experience, in the application of air brakes and hand brakes, is there any greater frequency in the use of one than the other, to cause broken wheels, or to produce breakages of that sort?

A. Well, we have broken wheels from overheating, a great deal more frequent with hand brakes than with air brakes; it is generally conceded that a set of air brakes will pay for themselves in a year, on account of the saving of the flat wheels and broken wheels.

Q. So that the tendency in railroading is toward air adoption, is it?

A. Yes, sir.

Q. On all classes of trains?

A. Yes, sir.

Q. Still, on most railroads, I understand more or less hand brakes are still used, is that so or not?

A. A very few.

Q. Very few now. Do you know George W. Fogle?

A. Yes, sir.

Q. How long have you been acquainted with him?

A. I couldn't tell you exactly, I should judge probably two years and a half; possibly three years.

Q. You remember, of course, the occasion when this occurred. Did you know him at that time?

A. Yes, sir.

Q. Did you know what his business was at that time?

A. Car-inspector.

Q. At what place?

A. Green River.

72 Q. State whether or not he was under your general charge and supervision.

A. He was.

Q. You, as foreman of the shops, also had the supervision of the car-inspectors, did you?

A. Yes, sir.

Q. Who employed car-inspectors at that place, and discharged them?

A. I did.

Q. Had you personal opportunity to observe the habits of Mr. Fogle and his capacity in doing his work?

A. Yes, sir.

Q. Had he worked under your direction prior to that in any other employment?

A. Yes, sir.

Q. What was that?

A. He worked under my direction as laborer and car-repairer.

Q. And car-repairer. What is the general class of labor that he would perform as car-repairer?

A. General work in repairing cars.

Q. In the shops?

A. Yes, sir; repairing broken trucks principally; I think he worked several months as oiler.

Q. Oiler of cars?

A. Yes, sir.

Q. Are you acquainted, in the course of railroading, with the usual character of work and employment engaged in, leading up to car-inspecting, or what is the usual training before becoming a car-inspector, that an employee has—are you familiar with that?

A. Yes, sir, as far as the Union Pacific Railroad Company is concerned.

Q. You know what the usual rule is there, in different places, do you?

A. Yes, sir.

Q. Well, I wish you would state what, if any, acquaintance with car-work is required as preliminary to inspecting?

73 A. A man is required to be a car-repairer first, generally; and generally an oiler; not at all times does he work at both; but generally he is a car repairer and oiler both before he is allowed to inspect trains, and he assists in repairing cars, and becomes familiar with all the parts before he is allowed to become an inspector.

Q. Are you able to state whether or not Mr. Fogle had such familiarity as you have stated, with cars?

A. He did.

Q. Before becoming an inspector?

A. Yes, sir.

Q. Are you able to state now about how long he had been inspecting at the time of this occurrence?

A. I could not.

Q. Don't remember?

A. I don't remember.

Q. You may state to the jury what character of man he was, as to competency, in your judgment, and care, in the exercise of his duties?

A. Mr. Fogle was considered by me——

Mr. BROWN: Just what you considered him.

Mr. WILLIAMS: What you considered him?

A. Mr. Fogle was considered by me a sober, industrious, thorough car-inspector.

Cross-examination of EDWARD A. LINDSLEY.

By Mr. BROWN:

Q. You never inspected cars yourself?

A. Never was employed as a car-inspector, sir.

Q. Your inspection of cars was either after they were broken or after the wheel had been condemned by some inspector, as a rule?

A. As a rule.

Q. Some question arises as to whether it was a crack or not, some man had thrown it out, you looked at it,—or if the wheel be broken, you would look at it; that was the nature of your inspection?

74 (No response.)

Q. Do you know whether the business of car-inspector requires a trained eye to detect readily these cracks—whether it requires a trained eye to detect these cracks readily?

A. I should presume that a trained eye would more readily detect them.

Q. The same as it would be necessary for a trained eye to detect counterfeit bills?

A. Yes, sir.

Q. For that view, you have inspectors who are experts in their line, don't you?

A. Yes, sir.

Q. Men that would pick out a crack that an ordinary man wouldn't see? You don't know how long Fogle had been car-inspector?

A. At the time of this——

Q. At the time of this accident?

A. I couldn't state without——

Q. Your opinion of him——

A. The best of my judgment it was several months, but I couldn't state how many.

Q. Your opinion of him is based principally on the fact that he is a sober industrious man, I suppose, was it?

A. No, not entirely that, sir; upon watching his performance in working upon trains; daily I watched him——

Q. Had you ever watched him particularly inspecting trains?

A. The same as I had other men under my supervision, daily, to a certain extent, more or less.

Q. He had been inspecting for a few months. How many years does it take to be an expert in this business of car-inspector?

A. It depends entirely upon the conduct of the party.

Q. Like any other business that would require expertness of the eye, I suppose?

A. Yes, sir; one man would learn more in a year than another would in six.

Q. Did you ever make any experiments on bursting wheels, in the shop or otherwise?

75 A. In what direction, sir?

Q. As to the causes of bursting wheels, by subjecting them to any pressure, or in any way to make any experiment?

A. I have made experiments upon wheels that had cracks, that were shopped for cracks; I never made any experiment upon the strength of a wheel—new wheel that showed no defect.

Q. When a car wheel bursts by overheating, is a new wheel as liable to burst as one with a crack?

A. Exactly.

Q. Exactly?

A. Yes, sir.

Q. And the fact of its having a crack or not wouldn't be affected by the heat, and if you had a car, or a train of cars, in which there were overheated wheels, you would as soon expect those where there was no old crack, as those that had, to burst?

A. No, I couldn't say that.

Q. Didn't you say, exactly as quick,—a new wheel would break by overheating?

A. You asked me if I didn't consider that a new wheel would burst as quick from overheating the rim, I understood your question.

Q. Yes, sir.

A. As an old one?

Q. Yes, sir.

A. Not a cracked wheel?

Q. As an old one, not as a cracked wheel?

A. Not as a cracked wheel.

Q. I put it as a cracked wheel?

A. No, I didn't understand it that way; I consider that a new wheel is just as liable to crack from overheating the rim as an old one.

Q. New wheel from the shop as one that had been run?

A. Yes, sir.

Q. I will put it the other way. Is a sound wheel, one that has no crack in it, as liable to burst from overheating as one that has a crack?

A. I should think not.

76 Q. You should think not. You have never tried any experiments on that, I suppose?

A. Yes, sir.

Q. Only just your estimate, that it wouldn't be—that the heat would find that out first. Now, in going down a grade, is it proper and suitable to change the brakes from time to time, from one car to another?

A. It is, sir; in using hand brakes, not with air.

Q. I mean using hand brakes; that is required of the brakeman?

A. Yes, sir.

Q. And they simply doing their duty in changing?

A. Yes, sir.

Q. From car to car. When you say that sometimes a crack will be seen hot, so that you could put a knife blade in it, and cool you couldn't see it,—I mean that you couldn't see it, or that an expert couldn't——

A. I mean that an expert couldn't see.

Q. How do you know what an expert could see or could not?

A. I have tried it.

Q. Tried it on somebody—on your experts?

A. Yes, sir.

Q. Tried it; you could stick a knife blade in, and some of your experts couldn't see it when it was cold?

A. Yes, sir.

Q. In view of that, you gave orders to have your wheels examined when hot?

A. Yes, sir.

Q. So that you can see them readily?

A. Yes, sir; our wheels don't get any heat, though, generally, unless we are at the foot of a hill.

Q. Well, you say this wheel would have been heated from the axle—from the hub, more or less, would it—didn't you say that?

A. No, sir.

Q. Didn't you say so on the direct examination?

A. No, sir.

77 Q. Well, they have some heat from running, I suppose, do they?

A. I didn't say that this wheel—this particular wheel had been "het."

Q. No, I don't suppose you ever saw this wheel before?

A. No, sir.

Q. But wheels coming into Green River have some heat from the running, do they?

A. Not from the east.

Q. Not from the east?

A. Not from the east.

Q. No heat coming in, on the train, if inspected the minute it stops?

A. No, sir; it isn't down grade to amount to anything, from the east in there; it is down grade a little, but not to require braking power sufficient to heat a wheel in the least, unless it should be on one wheel, one particular car, some brake set and left so.

Q. Don't the wheel heat from the hub somewhat—the axle heat?

A. It would if the axle run hot, if the bearing run hot—was allowed to run hot.

Q. In ordinary running, doesn't it have some heat?

A. Well, very little.

Q. Very little?

A. It sometimes is cold.

Q. What was this Mr. Fogle's business before he became car-inspector—was he a carpenter?

A. No, sir; he was car-repairer before he commenced inspecting, or a car-oiler, I am not positive which; I am not positive which capacity he was taken from when he was put to inspecting.

Q. You made up your mind that this broken wheel was the cause of this accident, did you, when you examined it?

A. I did; yes, sir.

Q. And that there was an old crack there?

A. Well, I can't say an old crack, sir; it was a brand-new wheel; there was a crack there—a crack that had been made before this accident.

78 Q. Of course when you saw it——

A. You can't call it a very old crack, because it was a brand-new wheel.

Q. —the wheel was broken clear off, when you saw it?

A. Yes, sir.

Q. And when you speak about there being an old crack there, you mean something earlier than the occasion of the accident?

A. Yes, sir.

Q. How did you determine that fact?

A. By the looks of the crack.

Q. What looks?

A. It showed it was an old crack.

Q. How did it show it?

A. By having dust worked in it, and particles of rust.

Q. You noticed those particles of dust and rust for about a quarter of the rim of the wheel, did you?

A. Nearly that, I should think.

Q. Quarter of the distance?

A. Also the mark would show, from traces of oil working into the crack.

Q. Who else looked at it with you?

A. Well, there was so many there that I would hardly undertake to name them, but our general officers were all there at the same time and examined the wheel with me at first.

Q. General officers?

A. Yes, sir, general officers of the road.

Q. General officers of the road?

A. Yes, sir.

Q. They saw that, and saw this——

A. Mr. Wartell, Mr. Dickinson, Mr. Hackley, Mr. Letzheimer; he was master mechanic at Evanston at that time, and Mr. Smith, general superintendent, were all there, and examined the wheel at the same time I did—got there at the same time I did.

Q. Didn't you have some talk there at that time?

A. Yes, sir.

Q. At that time did you say, "This looks bad for Green River"?

79 A. I did not, to my recollection.

Q. Don't you recollect using that language?

A. No, sir.

Q. "This looks bad for Green River?"

A. No, sir.

Q. Did you hear any one else say it?

A. I did not.

Q. You say you didn't say it?

A. Not to my knowledge, not to my remembrance; I could see nothing about the crack to warrant it.

Redirect examination of EDWARD A. LINDSLEY.

By Mr. WILLIAMS:

Q. Mr. Lindsley, I wish you would state whether or not, from your observation of that break, there was anything about it that indicated to your mind that it might have readily been discovered beforehand—was there anythimg about that crack that indicated to you in might have been readily seen if looked at?

A. No, sir.

Q. There was not?

A. I think if that wheel had been examined when the rim was heated, undoubtedly the crack would have shown itself visible to a car-inspector; an ordinary car-inspector—car-inspection, would have observed that crack if the rim had been severely heated; but otherwise I don't think that an ordinary car-inspection would have observed that crack, from what I saw of it.

Recross-examination.

By Mr. BROWN:

Q. You couldn't tell, of course, whether it could have been seen or not?

A. No, sir.

Q. Not being a car-inspector yourself, your orders to your men as to inspection, I suppose are, to be very particular and minute, not merely to casually inspect the matter——

80 A. Yes, sir.

Q. —but to inspect carefully? (Showing paper to witness.) I see you have got nine and a half inches across—that is nine and a half inches, is it?

A. Yes, sir, that wasn't made by me; it is just a sketch that I picked up to illustrate the make of the wheel.

Q. Who made this?

A. I couldn't tell you, sir.

Q. Where did you get it?

A. I got it at the Utah Central depot; just to illustrate the inside and outside plate of the wheel.

Q. How far is it across here?

A. I couldn't tell you by that diagram; 33-inch wheel—the diameter of it.

Q. That wheel was a 33-inch wheel, was it?
A. Yes, sir.
Q. Do you remember what part of the wheel had the old crack?
A. The outside plate, near the junction of the two plates.
Q. Along in here?
A. Yes.
Q. Would be the old crack?
A. Yes, sir.
Q. As you remember it?
A. As I remember it.
Q. You took no measurements?
A. No, sir.
A. Didn't preserve the wheel?
A. No, sir.
Q. It is only a matter of rather vague recollection, is it?
A. That is it, mere matter of recollection with regard to the length of the crack or——
Q. (Interrupting.) You examined, I presume, a good many wheels since then?
A. Yes, sir.
Q. A great many?
A. I have.
81 Q. A daily occurrence with you, almost, is it not?
A. Yes—I can't say daily occurrence to examine a broken wheel.
Q. Frequent occurrence?
A. Frequent occurrence.
Q. You wouldn't have any occasion to remember the exact length of crack, I suppose?
A. No, sir.
Q. Any particular one?
A. I didn't state I could remember the exact length.

WILLIAM A. MACCOLLUM, being sworn as a witness in behalf of the defence, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside, Mr. MacCollum?
A. In Ogden.
Q. What is your business?
A. My business is a car-carpenter.
Q. Where are you now engaged?
A. In the Central Pacific shops.
Q. At Ogden?
A. At Ogden.
Q. How long have you been engaged in railroad work, Mr. MacCollum?
A. Well, I couldn't tell exactly.
Q. About how long?
A. I have worked in the neighborhood of nine years for the Union Pacific, up to last January.

Q. Up to when?
A. Last January; since then for the Central Pacific.
Q. What is your trade before railroading?
A. My trade has been carpentering.
Q. Where were you engaged for the defendant here, The Union Pacific?
82 A. At Green River.
Q. All the time you have spoken of, nine years?
A. No, not all the time; I was there about seven years.
Q. And in what kind of employment?
A. At car-work.
Q. At car-work; working at the shops there?
A. Yes, sir.
Q. As car-carpenter?
A. Yes, sir.
Q. I wish you would state to the jury whether, in your employment, you were required at any time to make any kind of inspection of cars?
A. I have been; yes, sir.
Q. Have done so?
A. I have acted there as inspector.
Q. You have at some portion of the time acted in that capacity?
A. Yes, sir.
Q. As car-inspector?
A. Yes, sir.
Q. In the course of your work in the shops, I wish you would state to the jury whether or not that requires any observation of defects in car wheels?
A. Yes, sir; it does.
Q. Other portions of the car?
A. It does very often.
Q. Do you remember the occasion of this wreck in which Mr. Daniels was hurt?
A. Yes, sir.
Q. On Peru hill?
A. Yes, sir.
Q. As it is called, this side of Green River?
A. Yes, sir.
Q. State whether or not you were at the wreck.
A. I was there.
Q. What particular purpose brought you there, if anything special?
83 A. Well, we went there, as all railroad men are called, to clean wreck and straighten things up.
Q. State to the jury and court whether or not you had any special duty to perform in reference to wrecked or injured cars.
A. I hadn't at that time; only just the other shopmen had to go there and assist in clearing the track; I went in that capacity.
Q. Did you at that time take any memorandum, or ascertain what cars were wrecked?
A. I did after that.

Q. How long afterward?

A. Well, it was perhaps two or three days afterward.

Q. State whether or not you ascertained to what company's car this broken wheel belonged?

A. Well, as near as we could judge, it belonged to the Chicago and Milwaukee car.

Q. Did you ascertain that one of their cars had such a break in it?

A. Yes, sir; ascertained that from the similarity of the wheels in the different trucks; that is the way we had of classing them.

Q. You did that at the wreck, did you—on the ground there?

A. Not right at that time, but afterwards; I went back afterwards.

Q. Well, at the site of the wreck, then?

A. Yes, sir.

Q. Did you at that time know Mr. Fogle—George W. Fogle?

A. Yes, sir.

Q. Had you known him previous to that?

A. I had.

Q. About how long?

A. Well, I should judge a year and a half, perhaps; maybe longer.

Q. In what different vocations was he during that time, if you remember and know?

A. He was a shop hand at one time, and afterwards went to the oil-room, acted there as oiler and inspector.

Q. You knew of his being engaged in those several employments?

84 A. Yes, sir.

Q. State about how intimately you were connected in your work—you and he?

A. Well, I acted sometimes with him as a car-inspector, when they were crowded, and needed assistance; been called on to go down there; for a short time he worked under me.

Q. In the shops?

A. No, not in the shops—well, generally in the shops, not always.

Q. Well, you may state whether or not you had an opportunity to make observation of the methods in which he did his work?

A. I did.

Q. The character of competency in the various places that you saw him work, etc.?

A. I knew enough of him, that I considered him, as well as others, that he was competent.

Mr. BROWN: Don't swear for the others; just swear for yourself.

Mr. WILLIAMS:

Q. Well, confine it to what you considered him.

A. I consider him a competent man; very cautious, careful man, a man of good judgment in regard to his work.

Q. State whether or not that was so with reference to the different kinds of labor in which you saw him engage?

A. It was.
Q. All of them?
A. Yes, sir.

Cross-examination of WILLIAM A. MACCOLLUM.

By Mr. BROWN:

Q. When was it that you acted as car-inspector?
A. Well, it was at different times; whenever it became necessary for me to do that, or instead of my——
Q. (Interrupting.) Can you mention the years or parts of the years?
85 A. Well, I don't know as I could come anywheres near it.
Q. Whereabouts were you when you were car-inspector?
A. I never was employed as car-inspector.
Q. Well, when you acted as such? *A.* In Green River; you were a carpenter there?
A. Yes, sir.
Q. And they sometimes called on you to go out and inspect cars?
A. Yes, sir.
Q. Do you know whether in the month of April, 1887, you were called upon to inspect cars?
A. Yes, sir; at that time, before that, and after that.
Q. Was the business crowded at that time?
A. It was at times.
Q. It was crowded at times. I refer now to immediately before the Daniels accident—Daniels wreck; you say you was there and know about that wreck?
A. Yes, sir.
Q. Now, immediately before that, had you been called upon to inspect cars?
A. I had during that time, at different times.
Q. Immediately before that, you had?
A. Yes, sir.
Q. Your business was that of a carpenter regularly, was it?
A. Yes, sir.
Q. Car carpenter in the shop there. Who else beside yourself was called on as extra inspector on such occasion, or that occasion?
A. A man by the name of Beattie, working in the shop there.
Q. What was his business ordinarily?
A. Well, he was classed as a carpenter, the same as myself.
Q. Who else; anybody, that you think of?
A. Mr. Donaldson, Mr. Ross, and different ones.
Q. Mr. Fogle himself—was he engaged regularly in inspecting at that time, or was he called for extra work?
A. He was at that time engaged regularly.
86 Q. How long had he been engaged regularly as car-inspector at that time?
A. I couldn't tell you exactly.
Q. Was it years, or only months or weeks?

A. Well, it wasn't years, but it was months I expect.
Q. A few months, he had been regularly inspecting?
A. Yes, sir.
Q. Who else were the regular inspectors there?
A. I don't know as I could tell exactly who was there at that time; I never had any occasion to remember the different men.
Q. You say, as near as you could judge, this was a Chicago, Milwaukee & St. Paul car. I didn't understand exactly what means you took to judge it; what determined the fact that it was a Chicago & Milwaukee car—won't you repeat it?
A. Well, we considered that one of those wheels that belonged to that car, because it was the same class as the wheels that were in the truck where the others were missing.
Q. You made up your opinion from the general nature and construction of the wheel?
A. Yes, sir.
Q. Not because those pieces fitted into any other piece that you found?
A. No, sir.
Q. You didn't find any other piece, into which that piece fitted, did you?
A. I didn't carry it around.
Q. You didn't find any other piece that you thought would fit it, did you?
A. We knew where it came from.
Q. That is not answering my question.
A. I beg your pardon; what is the question?
Q. You didn't find any wheel which would have fitted that particular piece, did you?
A. I don't understand whether you wish me to——
Q. (Interrupting.) Did you find the balance of the wheel—did you find the remainder of the wheel—(illustrating with paper).
87 Now, having torn that paper off, we can find the paper that fitted, by the fit, this way, to it—in this way.
A. Yes, sir.
Q. Now you picked up—didn't pick it up, but you saw the little piece that was thrown off?
A. Yes, sir.
Q. Did you find any place that would fit it, the same as that paper?
A. Yes, sir; we found a piece on the axle, and the piece on the bank.
Q. Would the piece fit in the piece on the axle?
A. I didn't fit it in there, but it was——
Q. Would it have done so?
A. Yes, sir.
Q. The wheel remaining on the axle—the balance of it, that piece flying out—wouldn't the rest of the wheel all fly to pieces at once?
A. Not necessarily, unless it had been the center of the wheel—close to the hub of the wheel.
Q. Wouldn't you expect that to be the consequence to that wheel?

A. By finding the piece?
Q. Yes, if that piece was thrown out—such a piece as you see there, thrown out, in consequence of an old crack, the rest of the wheel would all go to pieces, wouldn't it?
A. Not necessarily.
Q. Did you inspect this crack to see whether it was old or new?
A. Not particular.
Q. Not particular?
A. No, sir.
Q. Didn't form any opinion on that, eh?
(No response.)

88 BARNEY RILEY, being sworn as a witness in behalf of the defense, testified as follows:

Direct examination.

By Mr. WILLIAMS:

Q. Where do you reside, Mr. Riley?
A. Green River, sir.
Q. How long have you resided there?
A. About thirteen years.
Q. What is your business?
A. My business is a car-inspector.
Q. For the U. P. Company?
A. Yes, sir.
Q. How long have you been engaged in that business?
A. I have been engaged in that business going on about—about twelve years.
Q. About twelve years, at that place?
A. Yes, sir.
Q. Were you ever a car-inspector at any other place?
A. No, sir.
Q. Your whole experience has been there?
A. Yes, sir.
Q. I wish you would state to the jury whether or not, in your experience, you have observed cracks in car wheels.
A. Yes, sir; I found a great many car wheels that has been cracked.
Q. State also whether you observed the effect upon such cracks, as to their appearance, when a wheel is heated.
A. Well, the most I ever did find was caused by being heated.
Q. The most you ever found was when the wheel was hot?
A. Yes, sir.
Q. Well, you may state to the jury whether or not they are more easily found at that time.
A. Yes, sir; they are more easily found.
Q. How do you account for that, if you have any reason in your mind that accounts for it?
89 A. Well, when the wheel is hot, why, the crack, it opens up.

Q. By the expansion?

A. By the expansion of the wheel, and the grease will run down; it leaves a mark there that can be seen.

Q. Do you remember the occasion of this wreck on the 3d of April, 1887, in which Mr. Daniels was hurt?

A. Yes, sir.

Q. Were you on duty that day?

A. Not on that day.

Q. Were you at Green River at that time?

A. Yes, sir.

Q. During what time of the twenty-four hours were you at work at that time?

A. I came on duty at 5 o'clock.

Q. Five o'clock in the afternoon?

A. Five o'clock in the afternoon.

Q. Worked during the night?

A. Yes, sir.

Q. Did you know Mr. Fogle at that time?

A. Yes, sir.

Q. And how long previous to that had you known him?

A. I should judge about a year and a half.

Q. You may state to the jury whether or not you ever worked with him in car-inspecting.

A. Well, no, not but very little; never had an opportunity, but very little.

Q. You were not a mate, or belonged to his gang?

A. No, sir; I was a night car-inspector.

Q. Do you know whether he was engaged in car-inspecting about that time?

A. Yes, sir.

Q. State to the jury whether or not you had opportunities to observe, and had observed, his manner of performing his duties and service as car-inspector.

A. Well, I have always seen him pay strict attention to his work.

Q. You have observed him then, at work?

90 A. Yes, sir; I inspected a passenger train with him that morning, the wreck occurred.

Q. That morning, you inspected a passenger train with him?

A. Yes, sir.

Q. Explain to the jury generally how this work of inspecting is done; how many men engage in it to a train, and so on.

A. Well, we generally have four men; two inspectors and two oilers.

Q. Go together as a gang, eh?

A. Yes, sir; we go together.

Q. Well, how is the work done?

A. Well, we use a hammer; sound the wheels, inspect the wheels inside, see that they ain't slipped on the axle, examine wheels thoroughly; truck frames.

Q. I wish you would state to the jury what your experience is with reference to ascertaining a defect in a wheel—what the most

reliable means, by which defects are discovered, is in your experience?

A. My experience in wheels, is detected by the eye, and closely examining the wheels.

Q. What with reference to sounding with a hammer, state whether or not that is any certain criterion?

A. Well, it is a custom that we always use—use a hammer; when I strike a wheel, if that don't sound to suit me, I will examine that wheel thoroughly. Otherwise, if the brake is set on the wheel, the hammer is no good at all; then I will examine that wheel thoroughly by the eye, inside and outside; sometimes in a train they will leave the air set on all the train, then we don't use no hammer; we expect to look that train over thoroughly by the eye.

Q. Are you able, from your experience, to form any definite opinion from the sound of a wheel, by striking it with a hammer, whether there is any crack in it?

A. No, sir.

Q. You are not able to do so?

A. No, sir.

Q. I believe you were not at this wreck, were you?

A. No, sir, I wasn't at the wreck.

91 Q. Heard of it at the time?

A. Yes, sir.

Q. What was the custom there at Green River with reference to the time of inspecting cars, with reference to their entering the yard—coming in off of the run?

A. Well, just as soon as a train enters the yard, why, we go and inspect it; probably there would be three sections of one train; certainly we would inspect the first train, and then take the second train just as they come.

Q. But this work, that is usually done soon after the trains enter, is it?

A. Yes, sir, soon after the train arrives in the yard.

Q. State to the jury, if you are able to, what condition wheels are in, usually, coming in from the east on the U. P. to Green River, as to being hot or otherwise?

A. Well, there is but very little grade from Rock Springs; the wheels generally come in cool.

Q. Generally come in cool?

A. Yes, sir.

Q. How far is Rock Springs east of Green River?

A. Fifteen miles.

Cross-examination of BARNEY RILEY:

By Mr. BROWN: You say you never have found any cracks unless the wheels are hot?

A. Oh, yes, I have found cracked wheels that hadn't been hot.

Q. I thought I understood you to say that the most you ever found——

A. (Interrupting.) The most I did find is—I found more when they were heated than I did when they were cold.

Q. But wheels are not brought in hot to Green River, eh?
A. Well, going from the west.
Q. They are brought in hot from the west?
A. Going from the west, there is more of a grade; but he asked me about going from the east.
92 Q. It wasn't a very good place for inspecting cars, from the east, then, was it?
A. Yes.
Q. What?
A. What did you say, sir?
Q. Was it a suitable place for inspecting cars from the east, or not?
A. Simple place?
Q. Suitable place?
A. Yes, sir.
Q. Could inspect them and see whether there were any cracks in the wheels, there, at Green River, couldn't you?
A. Yes, sir.
Q. Did you ever find any cracks in wheels, from the east, at Green River?
A. Yes, sir.
Q. You say you inspected a passenger train with this Mr. Fogle, that morning?
A. Yes, sir, on the morning that wreck occurred, I inspected a passenger train with him.
Q. Did you go on the same side of the train with him?
A. I took the opposite side.
Q. You took the opposite side?
A. Yes, sir.
Q. While you was inspecting one wheel he was inspecting another on the other side?
A. Yes, sir.
Q. You had no opportunity, then, to judge with what care he inspected his wheel, had you?
A. Yes, sir, we worked right together.
Q. With a car between you?
A. Right under the car; passenger train, we get right under the car, so that we can see the inside of the wheel, as well as the outside, inspecting a passenger train, we have to be very careful.
Q. And don't you inspect the outside of the car by going along on the outside first?
A. Yes, sir.
93 Q. Then go back on the inside?
A. No, sir.
Q. No, sir, or yes, sir?
A. We look at both sides of the wheel before we leave it.
Q. Before you leave it, you look at both sides of the wheel, and you thought he inspected that passenger train all right?
A. Yes, sir, he inspected that very carefully.
Q. How long had you had experience in inspecting at that time?
A. About twelve years.

WILLIS BROWN, being sworn as a witness in behalf of the defendant, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. What is your business, sir?

A. Well, I am working on the Central Pacific, trying air, and working at car-work generally.

Q. At what place?

A. Ogden.

Q. Working at car-work generally?

A. Yes, sir.

Q. State to the jury whether or not that includes inspecting car wheels.

A. Well, not particularly car wheels, but we are supposed to find all defects that are in the cars.

Q. Air and otherwise?

A. Air and everything, more especially air.

Q. That is the special business you are engaged in?

A. Yes, sir.

Q. How long have you been engaged where you now are?

A. About seventeen months at that—sixteen months.

Q. Have you ever been engaged in the business of inspection?

A. Yes, sir.

94 Q. Of trains, car wheels, etc., when they enter inspecting stations?

A. Yes, sir.

Q. On what road?

A. Union Pacific.

Q. Ever inspected on the Central Pacific, too?

A. Well, no more than I do now.

Q. What different places on the Union Pacific have you inspected?

A. At Eagle Rock, Butte, Carson—that is on the Northern Pacific and Union Pacific.

Q. Did you ever inspect any at Green River?

A. And at Green River, yes.

Q. Inspected at Green River for a short time, I understand, did you?

A. Yes, sir.

Q. When was that?

A. That was in March.

Q. What year?

A. 1887.

Q. Had you been a car-inspector before that?

A. Yes, sir, two years and a half.

Q. At what places, those you have named?

A. Yes, sir.

Q. While at Green River on the occasion you speak of, how long did you remain there?

A. Ten days; left there on the 11th of March.

Q. Where did you go from to go there?

A. I went from Ogden—direct from Ogden.

Q. And returned to what place?
A. To Ogden.
Q. State whether or not you became acquainted with George W. Fogle while you were at Green River in March, 1887.
A. Yes, sir, I worked with him.
Q. You worked with him, at what place?
A. Inspecting cars.
Q. During the time you were there?
95 A. Yes, sir.
Q. Then you had an opportunity to observe the methods in which he did his work as inspector?
A. Yes, sir.
Q. And did you observe it?
A. Well, we had to——
Q. (Interrupting.) Did you observe his manner of working?
A. Yes, sir, I did.
Q. Well, sir, from your opportunities to observe, and your observation made, I wish you would state to the jury what his habit was, and his capacity for such work?
A. Well, I think he was a competent man at the business that he was following, to the best of my judgment.
Q. You have been acquainted with a good many car-inspectors have you?
A. Yes, sir, I have worked with a great many.
Q. You may state to the jury what his habits of attention or inattention were, when he was engaged in his business, if you observed; whether he was careful and attentive, or otherwise, as the case may be?
A. Well, he seemed to attend strict to his business when he was at that.
Q. You and he worked on the same shift while you were there?
A. Yes, sir.
Q. Well from your observation of him at that time, Mr. Brown, and your acquaintance with car-inspecting and car-inspectors, what would you say as to his being a careful and competent man for that work at that time, or otherwise?
A. Well, I think he was competent of doing that work.

Cross-examination of WILLIS BROWN.

By Mr. BROWN:

Q. How long have you inspected cars yourself, Mr. Brown?
A. Well, about two years and a half I inspected cars, not counting that at Green River.
96 Q. You was engaged two years and a half?
A. Yes, sir.
Q. In car-inspecting?
A. In car-inspecting, yes, sir.
Q. Your method of doing it was, first with a hammer, was it?
A. Yes, sir, always supposed to carry a hammer.

Q. Take a hammer and hit it a lick, and if anything attracts your attention, you look it all over?
A. Well, we are supposed to look at the same time.
Q. Did you always do it?
A. Yes; we have to look at a wheel before we hit it, don't we?
Q. Yes, have to see it is a wheel. Do you have to look at it any more carefully than to see it is a wheel?
A. Well, we are supposed to inspect it and see there is no cracks or flaws in it.
Q. That is what you are supposed to do?
A. Yes.
Q. Do you always do it?
A. I know I do.
Q. Never get any accident?
A. I know I didn't hit the box of a car for a wheel.
Q. I mean by inspecting with the eye—of course in hitting it with a hammer, you hit the wheel. Do you always look the wheel all over carefully with your eye?
A. Well, I don't say I always done it one time as good as other times.
Q. How long do you spend on a wheel?
A. That would be a hard thing; I couldn't tell you.
Q. A minute?
A. I suppose so, yes.
Q. Are you sure of that?
A. I never timed myself; I don't know.
Q. How long does it take you to inspect a train of sixteen cars?
A. Sixteen cars?
Q. Yes.
A. Well, I should judge twenty-five or thirty minutes.
97 Q. How many wheels to the car?
A. Four.
Q. How many wheels in a car?
A. There would be eight wheels; I thought you asked how many pairs.
Mr. WILLIAMS: It is usual, in examining, to have a mate on the opposite side, is it not?
A. Yes, sir.
Q. So that each man inspects four wheels on a car of eight wheels?
A. Yes, sir.

PETER MEADEN, being sworn as a witness in behalf of the defense, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you reside now, Mr. Meaden?
A. Well, Nevada.
Q. How long have you resided there?
A. Six months.
Q. What is your business there?
A. Car inspecting and repairing.

Q. For what company?
A. Central Pacific.
Q. How long have you been a car-inspector, altogether?
A. About a year and a half.
Q. Where were you engaged in the spring of 1887—a year ago last spring.
A. At Green River, Wyoming.
Q. For the U. P. Company there?
A. Yes, sir.
Q. Did you know George W. Fogle there?
A. Yes, sir.
Q. Ever work with him?
A. Yes, sir.
98 Q. In what business?
A. Car-inspecting.
Q. For about how long did you work with him in that business?
A. Three months and a half.
Q. Do you remember when that was?
A. It was from the middle of April till the last day of July.
Q. Of last year?
A. 1887.
Q. Commenced, then, shortly after this wreck in which Mr. Daniels got hurt, eh?
A. Yes, sir.
Q. About the middle of April; that occurred, I believe, on the third. You and he worked on night or day shift?
A. On day shift.
Q. He was your mate during that time?
A. Yes, sir.
Q. What classes of trains did you inspect?
A. All classes that run in there in daytime.
Q. Passenger and freight?
A. Yes, sir.
Q. In the course of your business as car-inspector up to this time, state whether or not you have worked with a good many different car-inspectors?
A. Worked with about twelve or fifteen different ones.
Q. Twelve or fifteen different ones who were partners in your work at different times—belonging to different gangs. Did you, during the time you were working with Mr. Fogle, observe his methods, as to being careful or careless, as the case might be?
A. Yes, sir.
Q. What was his habit, as you estimate it, and judge it by your estimation of him?
A. Well, he was a competent man at that business, and careful.
Q. Steady at his work?
A. Yes, sir.
Q. Well, I wish you would state to the jury what in your
99 judgment, after your experience, to this time; as a car-inspector, were the characteristics of Mr. Fogle—whether he

was a capable and competent man for the work which he was engaged in as inspector, or otherwise?

A. Yes, sir; he was, so far as I worked with him, he was a competent careful man.

Cross-examination of PETER MEADEN.

By Mr. BROWN:

Q. How much experience had you had on April 1st, 1887?

A. I haven't worked much of any; I commenced the middle of April.

Q. That is the first experience you had?

A. The first car-inspection, yes, sir.

Q. He was your mate, and your first mate?

A. Yes, sir.

Q. You never had tried any other until you tried him?

A. No, sir.

Q. How long did you work with him?

A. Three months and a half.

Q. Inspecting there at Green River?

A. Yes, sir.

Q. During that three months and a half, he on one side of the train and you on the other?

A. Yes, sir.

Q. Did you go up to the wreck—this Daniels wreck?

A. Oh, I see it; yes, but I didn't pay no particular attention to it.

GEORGE W. FOGLE, being sworn as a witness, in behalf of the defense, testified as follows:

Direct examination by Mr. WILLIAMS:

Q. Where do you now reside *now*, Mr. Fogle?

A. I reside at North Platte, Nebraska.

100 Q. How long have you resided there?

A. About a little over a year.

Q. What is your business?

A. Laborer.

Q. Were you ever in the employ of the Union Pacific Railway Company?

A. Yes, sir.

Q. During that period, if you are able to state?

A. I was in about five years, off and on.

Q. At what different places?

A. North Platte, Nebraska, and Green River, Wyoming.

Q. When were you at Green River?

A. At Green River, 1886 and 1887.

Q. When did you leave there?

A. I left there the first day of August, 1887.

Q. First day of August, 1887, you left there?

A. Yes, sir.

Q. State whether or not you left the employ of the defendant company here, the Union Pacific, at that time?
A. Yes, sir.
Q. Have you since been in its employ?
A. No, sir.
Q. What was your business at Green River for the company?
A. Well, I was car-inspecting awhile, and oiling and wheel-repairing.
Q. What sort of repairs, Mr. Fogle?
A. Car repairs.
Q. Whom did you work under when you were in the car-repairing business?
A. Mr. Lindsley.
Q. State whether or not you remember the occasion of the wreck in which Mr. Daniels was hurt, and which has been testified to here.
A. Yes, sir.
Q. You remember that occasion, do you?
A. Yes, sir.
101 Q. You remember that train, or that section of the train, which was wrecked?
A. Yes, sir.
Q. Do you remember when it came into Green River from the east—about what time of day?
A. I couldn't say.
Q. Couldn't say what time of day?
A. No, sir.
Q. You remember its coming in, do you?
A. Yes, sir.
Q. State whether or not it arrived there during your shift, or the time you was at work.
A. Yes, sir, came in on my time.
Q. You was working with the day shift?
A. Yes, sir.
Q. I wish you would state whether or not you examined either side of that——
A. (Interrupting.) I inspected the south side.
Q. —train which went out and which was wrecked, or that section of the train—you inspected which side?
A. I inspected the south side.
Q. Do you remember now who was with you inspecting on that day?
A. I do not, sir.
Q. You don't recall that?
A. I couldn't tell.
Q. Well, I wish you would state to the jury whether or not you inspected all the wheels on the south side of that car?
A. I inspected all the wheels on the south side of the train—the whole train.
Q. All the sections?
A. Yes, sir.

Q. Well, state to them in what manner you inspected it.
A. Well, I tapped the wheels with the hammer, inspected them with the eye, both inside and outside.
Q. State if you had sufficient time to do your work.
A. I had plenty of time; yes, sir.
102 Q. Was there anything that attracted your attention shortly after that to the manner in which you looked over the car wheels on that side of the train?
A. Yes, sir.
Q. You heard of the accident shortly after, did you?
A. Yes, sir.
Q. Well, did that, or any circumstance connected with it, call to mind——
A. Yes, sir.
Q. —the fact that you had examined that train on the south side?
A. Yes, sir.
Q. Well, you may state whether or not you did that inspecting carefully or carelessly?
A. No, sir; I done it carefully, the same as I always did.
Q. During the time of your inspecting, was there ever any other accident occurred—shortly after your inspecting a wheel?
A. No, sir.
Q. Or when you was the last inspector?
A. Not that I remember of.
Q. Don't you remember any other case?
A. No, sir.
Q. Are you able to state now whether or not your inspection was made of every wheel on the south side of this train?
A. Yes, sir.
Q. State whether or not you discovered any crack, or any defect in any wheel?
A. I did not, sir.
Q. If there had been an open crack, one that was visible to the eye on the outside plate of either of those wheels, I wish you would state to the jury whether or not, in your opinion, you examined it closely enough to have seen it?
A. Yes, sir; I examined it close enough to see it.
Q. Was your eyesight good?
A. Yes, sir.
Q. And you discovered no crack in any of them on that day?
A. No, sir.
103 Q. On that train?
A. No, sir.

Cross-examination of GEORGE W. FOGLE.

By Mr. BROWN:

Q. Do you testify from recollection, or simply from your habit?
A. Recollection.
Q. When you say you examined every wheel?

A. Recollection, sir.
Q. You remember that train particularly, do you?
A. I remember all the trains of that day.
Q. Do you remember all the trains of every day?
A. No, sir.
Q. You simply remember that day?
A. I simply remember that day, on account of the wreck.
Q. When did you become satisfied you had examined all the trains that day?
A. Well, not only by that, because I have been there all day, examined them all that came in.
Q. Did you examine all the trains on the south side that day?
A. Yes, sir.
Q. All the trains?
A. Yes, sir.
Q. You examined this train as it was going out—before it went out, was it?
A. Examined it when it came in.
Q. Was it the same train that came in, that went out?
A. Yes, sir.
Q. Or did you make up a new train there?
A. No, sir; it was the same train that came in from the east, went west.
Q. Wasn't number 19 made up out of a variety of other trains there?
A. Well, this train was, I expect; of course they make up trains there for the short line and the main line.
104 Q. Now, those trains that are made up for the main line,—when did they come in with reference to the time of their going out?
A. Well, they come in from the east, and then they make up trains there.
Q. Now, this train is supposed to have gone out in the evening of the 3rd. When did the cars come in, from which that train would be made up?
A. Well, this train came in in the afternoon, because it was behind time; didn't come in until late in the afternoon.
Q. This train that went out from Green River was made up from several other trains, wasn't it?
A. Yes, sir.
Q. When did those several other trains come in?
A. They came in in the forenoon.
Q. Any of them the day before?
A. I don't know.
Q. You don't know?
A. Might have been some cars been in.
Q. What?
A. Might have been some cars there in the yard.
Q. Might have been cars in this train that went out on the 3rd, that came in the day before, for what you know—that was frequently the case, was it not?

A. Well, yes, sir; they do make up trains that way.
Q. New train is made up—you inspected your cars before the new train was made up?
A. Yes, sir.
Q. So that your inspection that you speak of, applied to all the trains that arrived that day?
A. Yes, sir.
Q. And not the train that went out.
A. We inspected them before they went out.
Q. You inspected the cars out of which it was made, when they arrived, not when they went out?
A. When it arrived.
Q. You didn't inspect this train before it went out?
105 A. We inspected them when it arrived.
Q. This train in the form in which it went out, didn't arrive at all?
A. I don't understand you.
Q. This train, being made up of cars arriving in another form, you never inspected this train at all, did you?
—. ——.
Q. How was that?
A. Oh, they was inspected the day before, and some of them probably came in in the night.
Q. It was the cars of the other train, that arrived from the east, that you inspected, was it not?
A. Yes, sir.
Q. Not that you inspected any train after it was made up to go west?
A. No, sir.
Q. Did you inspect the day before?
A. Yes, sir.
Q. On the 2nd?
A. Yes, sir.
Q. Did you inspect the day after, on the 4th?
A. Yes, sir.
Q. You inspected every day?
A. I inspected every day.
Q. Who was your mate at that time?
A. That I couldn't tell you.
Q. Was there anybody besides two of you?
A. Yes, sir.
Q. How many car-inspectors per day at that time?
A. There were two inspectors and two oilers.
Q. That is all you were using at that time?
A. Yes, sir.
Q. Was there a rush of business along about those days?
A. No, sir.
Q. No rush of business?
A. No, sir.
Q. No crowd of business in March?
A. No, sir.

106 Q. Now, how long did it take you to inspect a train of 20 cars?

A. Oh, probably 15 or 20 minutes.

Q. Going along on the outside, and hitting each——

A. Yes, sir.

Q. —car?

A. Each wheel.

Q. Each wheel; then crawling in on the inside and hitting it again?

A. No, sir; don't hit it on the inside; just look on the inside to see whether there is any cracked wheels.

Q. How do you do it, crawl under, or look around?

A. No, sir; crawl right under—crawl right under and back out again.

Q. Each car, as you go along?

A. Yes.

Q. So that you only pass over the work once?

A. Yes, sir.

Q. Now, as you hit a car, how carefully do you look it over—as you hit a wheel, how carefully do you look it over?

A. Look it over carefully enough so that we don't see any cracks.

Q. Don't see any cracks, that satisfies you?

A. Yes, sir.

Q. Frequently happens that you just hit a wheel and pass right along, don't it?

A. Not very often.

Q. How long do you suppose you pause on a wheel?

A. Oh, probably two or three seconds.

Q. Two or three seconds on a wheel?

A. Yes, sir.

Q. Pause on each wheel two or three seconds?

A. Yes, sir.

Q. Give it a glance; there was nothing about the cars of that particular day that you can remember, I suppose?

A. Not as I can remember.

107 Q. How many cars do you suppose you inspected per day along about those days?

A. That I can't say; I can't guess.

Q. Did you have any particular rule as to taking the south side?

A. Yes, sir, always took the south side.

Q. Never took any other side than the south side?

A. Always took the south side.

Q. Freight trains arrived through the night also?

A. Yes, sir.

Q. Freight trains arriving from the east, during the night of April 2nd and 3rd?

A. Yes, sir.

Q. Some of those cars were sometimes made up into the train which goes west next day?

A. Yes, sir.

Q. Who inspected them, do you know?
A. Mr. Riley.
Q. Mr. Riley inspected them?
A. Yes, sir.
Q. Who else?
A, I couldn't tell who the other fellow was.
Q. How many years experience did you have at that time?
A. I only worked ten or eleven months at it.
Q. Had you worked inspecting ten or eleven months?
A. Yes, sir.
Q. Regularly inspecting, as long as that—ten or eleven months?
A. Yes, sir.
Q. What are you doing at this North Platte?
A. Driving team.
Q. For yourself or somebody else?
A. For somebody else.
Q. Whom are you driving for?
A. Patterson.
Q. Mr. Patterson. Who requested you to come here, in this trial?
108 A. The Union Pacific Railroad Company.
Q. Who asked you?
A. Mr. Bullard, the superintendent.
Q. The superintendent of what?
A. The superintendent of the U. P. railroad—assistant superintendent.
Q. Bullard, the assistant superintendent, came to you and asked you to come here?
A. Yes, sir; he had a telegram.
Q. He had a telegram and went to you?
A. Yes, sir.
Q. Paid you for coming?
A. He hasn't yet.
Q. What did he promise you?
A. Didn't promise me anything.
Q. Just said he wanted you to come, and you came?
A. Yes, sir.
Q. When was it Mr. Bullard came to you?
A. It was a week ago to-day.

Redirect examination of GEORGE W. FOGLE.

By Mr. WILLIAMS:

Q. I promised, since you have been here, to see you paid for your time and expense, did I not?
A. I guess you did.
Q. Do you remember the number of this train that was wrecked?
A. Yes, sir.
Q. What was it?
A. Fourth, 19.
Q. What do you mean by fourth—fourth section?

A. Yes, sir.
Q. Fourth section, number 19; was number 19 at that time a daily train west?
A. Yes, sir.
Q. Daily freight?
109 A. Yes, sir.
Q. Do you remember its time of arrival, if it was on time?
A. 10.30, when she is on time.
Q. On this day it was not on time, you say?
A. It was late.
Q. And came in in the afternoon?
A. Yes, sir.
Q. Do you know whether any of the cars which went out in section 19 had been changed in Green River or not—that went out in section 4?
A. Yes, sir; they was all changed—most of them.
Q. Most of them were changed?
A. Yes, sir.
Q. From one section to another?
A. Yes, sir.
Q. Do you know what section 4 was, as it came in—do you remember, or did you ever know?
A. What's that?
Q. This wrecked train went out as section 4 of number 19?
A. Yes, sir.
Q. Do you know what section it was as it came in?
A. Yes, sir; it was the fourth section of 19.
Q. As it came in?
A. Yes, sir.
Q. Went out in the same way?
A. Went out in the same way.

Recross-examination of GEORGE W. FOGLE.

By Mr. BROWN:

Q. You say it came in and went out the same way; the cars were redistributed?
A. Yes, sir.
Q. And remade up entirely?
A. Yes, sir.
Q. So that what cars went out on this fourth section of 19 didn't come in on any one train?
110 A. No, sir; I don't suppose they did.
Q. Now, what time did the other three sections of 19 go out?
A. Well, that I couldn't tell.
Q. What was the regular time for 19 leaving?
A. I think it was about 11 o'clock.
Q. In the forenoon?
A. Or 11.30; yes, sir.
Q. And this was a delayed train that went out that day?

A. Yes, sir.
Q. Were there four sections every day to 19?
A. No, sir.
Q. How many, usually?
A. From one to three.
Q. Was the usual rule—a little more on this occasion?
A. Once in a great while.
Q. There were four.
A. Yes, sir.
Q. Showed an unusual rush of business?
A. Yes, sir.

Testimony closed.
The foregoing is all the testimony given in said case.

At the conclusion of the testimony in said case, the court instructed the jury as follows, to wit?

Charge to the Jury.

GENTLEMEN OF THE JURY: You have listened to counsel who have appeared in this matter, and we now give our attention to the legal side of the case.

This is an action brought by an employee against his employer to recover for an injury while engaged in the work in which he was employed, by reason of an alleged defective wheel, or a portion of the machinery that he was required to operate.

111 The plaintiff, in his complaint, sets out the employment, the alleged accident, and the circumstances attending it. The defendant, in its answer, admits that it is a corporation, admits the employment but denies liability on the ground alleged.

1st. The rule of law is that the master, or employer, is liable to his employee or servant for any injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist in the employment of unfit and incompetent servants and agents; or in the furnishing for the use of the servant, machinery and other implements or appliances, improper, unsafe, for the purposes to which they may be applied.

2nd. Now you are the judges, under *under* our statute, of the facts in the case. You are the judges of the credibility of the witnesses who appear before you, and also of the force or weight of the evidence presented here. You have seen and heard them testify and noticed their manner. You are as I just now said, the judges of the facts in the case.

3rd. The question is one of negligence; and negligence may be defined to be, the omission of some duty, or failure to perform some duty or obligation incumbent upon some person—in this case, as alleged, upon the defendant.

A corporation has various obligations. It has duties in regard to its passengers, people who may cross the highway, and its employees. The latter is the question for your considerotion and examination this morning.

4th. A common carrier, like the defendant here, is required to use a reasonable care, consistent with the nature and extent of the business, and provide proper machinery; but it is not responsible for hidden defects, which could not have been discovered by a careful inspection. That is one of the points in this case for your consideration, and you will bring in your verdict on that point.

5th. The burden of proof is, in this case, as in all other cases like it, upon the plaintiff, to make out his case to your satisfaction. The law is well settled, both here and in England, our mother country, that the employer should adopt such suitable implements
112 and means to carry on the business as are proper for that purpose; and where there are injuries to its servants, or its workmen, and they happen by reason of improper or defective machinery or appliances in the prosecution or carrying on the work which they are employed to render, the employer is liable, provided he knew, or might have known, by the exercise of reasonable skill, that the apparatus was unsafe and defective. If, by reasonable and ordinary care and prudence, the master may know of the defect in the machinery which he operates, it is his duty to keep advised of its condition, and not needlessly expose his servants to peril or danger. The servant has no means of ascertaining the defect, as a master has. He should therefore exercise that care which devolves upon a prudent employer in like circumstances.

As I said before, it is not necessary that the master should know that the materials or machinery are defective or unsafe, to be sufficient to hold him for a liability for any injury arising therefrom, if he could have known if he had exercised reasonable care.

6th. The rule is unqualified that the master is bound to use all reasonable care, diligence and caution in providing for the safety of those in his employ, and furnishing for their use in his work sound and suitable tools, implements and appliances and machinery in the prosecution thereof, and keeping the same in repair.

7th. The ignorance of the master of defects in the instruments or appliances used by his servants in performing his work, is no defense to an action by the employee who has been injured by them, when by the exercise of proper care and inspection, the master could have discovered and remedied the defects, and avoided the danger incident therefrom.

8th. In this case, if you find that the plaintiff was injured in consequence of the wreck of the train, caused by a crack and break in one of the wheels of the car, on a train operated by the plaintiff; if you find that, by the exercise of proper care and caution in inspecting the wheels, the crack was of such a nature that it might have been discovered by the agents or servants of the defendant, employed for that purpose, then such neglect to discover the
113 crack was negligence on the part of the defendant, and for which it may be held liable in this action.

9th. If you find that there was a want of care and diligence on the part of the persons engaged in inspecting the wheels of the cars of defendant, and that the accident was caused thereby, it is not a defense for the defendant to show that it used proper diligence and

care, alone and only, in the selection of such agents, but the defendant is responsible for the acts of his employees in repairing and inspecting machinery to the same extent as if he were himself present doing the act.

10th. If you find for the plaintiff, that there was no negligence on his part, and that there was negligence on the part of the defendant, then you come to the measure of damages. The plaintiff is entitled to recover such damages as shall compensate him for all the injuries he has suffered, and you may take into consideration the extent to which the plaintiff has been permanently disabled, the suffering he has undergone, bodily and mentally, and which he is liable to undergo from this accident hereafter, and also, as I have said, the mental agony or suffering, that he has suffered or may suffer in consequence of this accident, but you may not take into consideration, in estimating the amount of damages, the cost or expenses, or the expense of employing counsel, in bringing his suit to trial for the purpose of recovering these damages.

11th. As I have already intimated, in a case of any injury to the plaintiff by the negligence of the defendant, if it appears that the plaintiff himself has also been negligent in the same connection, that his own negligence or want of ordinary care and caution so far contributed to the injury complained of that, but for such concurring negligence on his part, the accident would not have happened, he is guilty of what is known in the law as contributory negligence; and in that case the plaintiff cannot recover for such injury. The complaint alleges that the plaintiff was free of any such negligence as that, but if you find from the evidence that the train on which the plaintiff was engaged as a brakeman, at the time of the accident or injury, consisted of twenty-five cars or thereabouts; that the train was going down a heavy grade or hill, and that the
114 plaintiff and a fellow-brakeman set brakes only on six or seven cars; and if you further find from the evidence that the plaintiff, in the exercise of ordinary care, should have set a larger number of brakes, and that his failure to do so caused or tended to cause the breaking of the wheel, then you may find for the defendant.

12th. In employing the plaintiff, the corporation defendant did not become an insurer of his life or his safety. The servant takes the ordinary risks of his employment. The duty of the defendant towards him was the exercise of reasonable care in furnishing and keeping its machinery and appliances, about which he is required to perform his work, in a reasonably safe condition. It was the defendant's duty also to use like ordinary care in selecting competent fellow-servants, and in a sufficient number, to insure that the work would be safely done; and this duty was discharged by the defendant if the care disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men, engaged in the same kind of business, ordinarily exercise.

13th. You are also further instructed that, as between employer and employee, between master and servant, as in this case, negli-

gence on the part of the former is not proven, or to be inferred, simply from the existence or occurrence of the accident which caused the injury complained of.

14th. You are to consider the testimony under the light of these principles of law which I have given you. You are to consider the case as between two individuals, like John Doe and Richard Roe. You are not to consider whether one is rich or poor, or neither rich or poor; but simply as between individuals, and your verdict is to be such a reasonable one as, taking all the facts into consideration, from the evidence adduced before you, shall make your verdict a just and righteous one.

I think I have covered all the points, gentlemen, which I have been asked to charge the jury upon. That is all, I believe, that I need say to them now. You may have exceptions.

115 The foregoing constitutes the entire charge of the court to the said jury in the said case.

To the giving of each of the aforesaid instructions designated 5th, 6th, 8th, 9th, 10th, 11th and 12th, and each and every part thereof, the defendant by its counsel then and there excepted.

The defendant also requested the court to give the jury certain other instructions, which were reduced to writing, and numbered respectively third, fourth, fifth, sixth, seventh, and eighth, and in the form following, to wit:

Third. In employing the plaintiff as brakeman on its trains, the defendant did not become an insurer of his life or safety. Its duty towards him was simply to exercise ordinary care in furnishing and keeping its machinery and appliances with and about which he was required to perform his work in a reasonably safe condition; also, to use like ordinary care in selecting competent fellow-servants, and in sufficient number to make it probable that the work would be safely done; and this duty was discharged by the defendant if the care bestowed by it, in these several matters, accorded with that reasonable skill and prudence which experienced men engaged in the same kind of business ordinarily exercise.

Fourth. The plaintiff by his contract of hiring was held to assume the risks of injury from the ordinary dangers of the particular employment and the nature of the business engaged in; and if you find from the evidence that the accident causing the injury in question was one of the perils incident to the employment, your verdict should be for the defendant.

Fifth. The presumption of the law in this case is that the defendant exercised proper care and diligence in employing competent and sufficient number of servants to safely carry on its several departments of labor, and in furnishing safe machinery and appliances with which the plaintiff was to do his work, and the burden of proof to show the contrary is on the plaintiff.

You are further instructed that as between employer and servant as in this case, negligence on the part of the former is not
116 proven, nor to be inferred from the existence of a defect which caused the injury.

Sixth. Although the inspector of the defendant at Green River

station, whose duty it was to inspect the said broken wheel, was guilty of negligence in making the inspection, and that negligence resulted in the wrecking of the train on which the plaintiff was, and the injury of which he complains, still he cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of such inspector or retaining him in his position; and to establish such negligence on the part of the defendant not only the incompetency of such inspector must be shown, but it must also be shown that defendant failed to exercise ordinary care to ascertain his fitness for that service prior to the appointment, or failed to remove him after his incompetency had come to the notice of the defendant, or to some officer or agent of defendant having power to remove him; or after such incompetency would have been ascertained by the exercise of ordinary care on the part of the defendant or such agent or officer.

Seventh. To render the negligence of the inspector whose duty it was to inspect the said broken wheel the negligence of the defendant, or to render the defendant liable therefor, it is incumbent on the plaintiff to prove that said inspector was appointed to or retained in his said position with knowledge on the part of the defendant, or some officer or agent of it having the power of appointment and removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable and ordinary care and diligence on the part of the defendant, or of such officer or agent.

Eighth. If the jury find from the evidence that the train on which the plaintiff was engaged as a brakeman at the time of receiving the injury consisted of twenty-five cars or thereabouts, that the train was going down a heavy grade or hill, and that plaintiff and his fellow-brakemen set brakes on only six or seven cars, and if you further find from the evidence that an application of brakes has a tendency to heat the wheels and the heat so produced is greater where only a small number of brakes are set, that a
117 high degree of heat so produced has a tendency to cause the wheels to burst, and you further find that the plaintiff in the exercise of ordinary care should have set a larger number of brakes and that his *his* failure cause- or tended to cause the breaking of the said wheel, then you should find for the defendant.

But the court refused to give to the jury the said instructions so requested or either of them, except such portions thereof as were given in the changed and modified form in the charge to the said jury as hereinbefore set forth; to which refusal of the court the defendant then and there excepted.

On the 27th day of November, 1888, the jury returned a verdict for the plaintiff in the sum of ten thousand dollars, and thereafter judgment was entered in due form thereon in favor of the said plaintiff and against the said defendant for the said sum, and costs taxed at $104.90.

Afterward and within the time required by law, the said defendant served upon the said plaintiff and filed in said cause a notice of

its intention to move for a new trial, which was in the form following, to wit:

(Title of Court and Cause.)

To the said plaintiff and to Arthur Brown, Esq., his attorney:

You are hereby notified that the said defendant intends to move the said court for a new trial herein, upon the following grounds, to wit:

First. Excessive damages, appearing to have been given under the influence of passion and prejudice.

Second. Insufficiency of the evidence to justify the verdict, and that it is against law.

Third. Error in law occurring at the trial and excepted to by the defendant.

118 The said motion will be made on a statement of the case.

P. L. WILLIAMS,
Attorney for Defendant.

Dec. 6th, 1888.

The said defendant now assigns the following errors and grounds for a new trial, to wit:

First.

Excessive damages, appearing to have been given under the influence of passion and prejudice.

Second.

Insufficiency of the evidence to justify the verdict, and that the said verdict is against law, in this, to wit:

a. The evidence fails to show that the crack in the said car wheel, alleged to have been the cause of the accident, could have been discovered by proper inspection, and fails to show that the said crack or defect would have been discovered at said Green River station if the service of inspection at that place had been suitable and sufficient.

b. It fails to show that the defendant negligently or wrongfully or at all employed, or had in its service incompetent persons to inspect its car wheels at said place; or that it did not employ enough inspectors to properly do the work, or that those employed there hurriedly, improperly or negligently inspected the said wheels; and the said evidence further fails to show that the said crack in said wheel was not discovered through the carelessness or negligence of defendant.

c. The evidence shows that the plaintiff himself was negligent and careless in not setting a larger number of brakes in the said train, thereby lessening the friction on each wheel upon which the brake was applied, and the liability to break, and that the said negligence contributed to cause the injury complained of.

119 Third.

Error in law occurring at the trial and excepted to by the defendant, as follows, to wit:

a. The court erred in overruling the defendant's motion for a judgment of nonsuit, made at the close of the plaintiff's testimony.

b. The court erred in giving each of the said instructions designated 5th, 6th, 8th, 9th, 10th, 11th, and 12th.

c. The court erred in refusing to give each of the instructions requested by the defendant and in the form the same were asked, and which are numbered third, fourth, fifth, sixth, seventh and eighth.

P. L. WILLIAMS,
Attorney for Defendant.

Received this statement this 8th day of April, A. D. 1889, and hereby stipulate that the same was served in due time.

ARTHUR BROWN,
Attorney for Plaintiff.

TERRITORY OF UTAH, }
County of Salt Lake, } ss:

I, the undersigned, judge of the third judicial district court of Utah Territory, allow the foregoing statement.

C. S. ZANE, *Judge.*

Dated July 12, 1889.

We agree that foregoing statement is a correct statement of evidence and decisions.

ARTHUR BROWN,
Attorney for Plaintiff.
P. L. WILLIAMS,
Attorney for Defendant.

July 12, 1889.

120 (Title of Court and Cause.)

The motion of the defendant for a new trial herein is now submitted to the court without argument by the attorneys for parties; and it is ordered that said motion for a new trial herein be, and the same is hereby overruled. Defendant excepts, and attorney for defendant asking therefore, it is ordered that defendant be and is allowed sixty days' time within which to file notice of appeal, and undertaking on appeal and perfect appeal herein.

Dated July 12th, 1889.

(Title of Court and Cause.)

Notice of Appeal.

To the said plaintiff and to Arthur Brown, Esq., his attorney:

Take notice that the defendant in the above-entitled action hereby appeals to the supreme court of said Territory from the judgment

therein rendered and entered in the said district court, on the 27th day of November, 1888, in favor of the said plaintiff in the said action and against the said defendant; and also from the judgment and order therein made and entered in said district court on the 12th day of July, 1889, in favor of the said plaintiff and against the said defendant, in overruling said defendant's motion for a new trial in said action.

P. L. WILLIAMS,
Attorney for Defendant.

Endorsed: Title of court and cause. Notice of appeal. Copy served on me September 9th, 1889. Arthur Brown, attorney for plaintiff. Filed September 9th, 1889. Henry G. McMillan, clerk, by Fergus Ferguson, deputy.

121 TERRITORY OF UTAH, } *ss*:
County of Salt Lake, }

The undersigned attorneys for plaintiff and defendant hereby agree that the foregoing is a full, true and correct copy of the complaint, answer, verdict, judgment on verdict, notice of motion for new trial, statement on motion, order overruling motion and notice of appeal.

It is further agreed that an undertaking on appeal, in due form, has been properly filed.

Witness our hands this 21st day of October, 1889.

(Signed) ARTHUR BROWN,
Attorney for Plaintiff.

(Signed) P. L. WILLIAMS,
Attorney for Defendant.

122 In the Supreme Court of Utah Territory.

SATURDAY, *January* 18*th*, *A. D.* 1890.

Present and presiding: The Honorable Henry P. Henderson, associate justice; the Honorable Thomas J. Anderson, associate justice, and the Honorable John W. Blackburn, associate justice.

WILLIAM DANIELS, Respondent,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Appellant.

This cause, coming on regularly to be heard, was argued by Parley L. Williams on behalf of appellant, by Arthur Brown in reply, was submitted and taken under advisement.

SATURDAY, *March* 1*st*, *A. D.* 1890.

Present and presiding: The chief justice and all the associate justices.

WILLIAM DANIELS, Respondent,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Appellant.

This cause having been heretofore argued and submitted, and the court being sufficiently advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court be, and the same is hereby, affirmed.

Opinion of the court by Blackburn, A. J., Henderson and Anderson, J. J., concurring.

Thereupon and on the application therefor of counsel for appellant, it is ordered that the penal sum of a supersedeas bond to be given on writ of error taking this cause to the Supreme Court of the United States be, and is hereby, fixed at $20,000.

123 In the Supreme Court of the Territory of Utah.

WILLIAM DANIELS, Plaintiff and Respondent,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Appellant and Defendant.

BLACKBURN, *J.*:

This is a suit by a brakeman, an employee of the defendant company, for an injury to him while in the line of his duty on a train that was wrecked. He was severely injured and permanently in one leg and one of his shoulders, so as to be unable to perform manual labor. The evidence tends to show that the train on which the plaintiff was at work as brakeman was wrecked by a broken wheel; that there was an old crack in the wheel which could have been seen by proper inspection, and the question was fairly submitted to the jury and they found that this was negligence in the defendant company.

We think the evidence abundantly supports this finding.

It was the duty of the company to furnish reasonably safe cars for the running trains and to have them inspected with reasonable care at proper intervals, and if an employee was injured by a
124 neglect to perform this duty the company is liable to him for the damage he sustained.

On this branch of the subject we see no error.

The instructions, as we think, state well and fairly the law of the case, and no point is made on them in the brief of appellant's counsel.

But the contention of the defendant company is that if there was negligence it was the negligence of the car-inspector, and he was the fellow-servant of the respondent. If this contention is true the respondent cannot recover and this case should be reversed.

As to who are fellow-servants there have been a great many and

great variety of decisions, and it would serve no useful purpose to review them.

However various, the decisions agree the weight of authority is that in order to constitute servants of one master—fellow-servants within the rule respondent superior—they must be engaged in the same line of work; be under the control of the same foreman; be employed and discharged by the same head of the department in which they work; that they labor together in such personal relations that they can exercise an influence upon each other promotive of proper caution in respect of their mutual safety; that they shall be at the time of the injury directly co-operating with each other in the particular business in hand or that their mutual duties shall bring them into habitual conassociation as that they may exercise an influence upon each other promotive of proper caution, and to be so situated in their labor to some extent to supervise and watch the conduct of each other as to skill, diligence, and carefulness.

125 Kelly *vs.* Chicago and Alton Railroad Co., 127 Ill., 637.

The evidence in this case clearly shows that the inspector of cars is not in the same line of work with the brakeman. He has nothing to do with the running of trains; is not under the control of the conductor, but reports to, is appointed by, and may be discharged by and is under the direction of the foreman of the repair shops; has no conassociation with and is rarely seen by the brakeman on the train, unless casually noticed by him when the train is stopped. They have no work in common; are not so associated in their labor as to be able to act together in a way promotive of their mutual safety.

We cannot say, therefore, as a matter of law, that the car-inspector in this case was a fellow-servant of the respondent when the accident occurred.

It is contended also by appellant that the damages are excessive. On that point the jury were properly instructed. It is peculiarly the province of the jury to estimate the damages in this class of cases, and they doubtless took into consideration what they were legally authorized to do—that the respondent was lamed and deformed in one leg for life and permanently disabled in one shoulder, so that he was wholly rendered unable to perform manual labor; that he was rendered entirely helpless by the accident; that he was neglected for more than two days before his wounds were dressed, and that he suffered unnecessarily in mind and body from his injury. The damages are seemingly heavy, but, in view of the facts of the case, we do not think are so excessive as to justify a *renewal.*

126 Therefore we cannot say that the jury were influenced by passion or prejudice in assessing the damages at the amount they did.

We think, therefore, the judgment should be affirmed.

Judgment affirmed.

Henderson, A. J.; Anderson, A. J., concur.

Endorsed on back: Wm. Daniels *vs.* Union Pacific R'y Co. Opinion. Filed March 1st, A. D. 1890. Jos. P. Bache, clerk.

127 UNITED STATES OF AMERICA:

——— ———, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1890, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein The Union Pacific Railway Company, a corporation, is plaintiff in error and you, William Daniels, are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to each of the parties in that behalf.

Witness the Honorable Charles S. Zane, chief justice of the supreme court of Utah Territory, this 12th day of April, A. D. 1890.

C. S. ZANE,
Chief Justice of the Supreme Court of Utah Territory.

A copy of the foregoing citation was served on me this 12th day of April, A. D. 1890.

ARTHUR BROWN,
By F. E. BARKER,
Attorney for William Daniels, Def't in Error.

[Endorsed:] Wm. Daniels *vs.* Union Pacific R'y Co. Citation. Filed Apr. 12, 1890. Jos. P. Bache, clerk supreme court Utah, by F. E. McGurrin, deputy clerk.

128 In the Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
WILLIAM DANIELS, Defendant in Error.

Assignment of Errors.

The said plaintiff in error now assigns as error:

First. That the said supreme court of Utah Territory erred in sustaining the decision and action of the said district court of the third judicial district of said Territory in overruling and denying the motion of the plaintiff in error (defendant in said district court) for a new trial on the several grounds stated in said motion and contained in the record herein, and thereby pepetuating and continuing the said error in said supreme court.

Second. The said supreme court of said Territory erred in sustaining the decision and ruling of the said district court in overruling and denying the motion of the plaintiff in error for a judgment of nonsuit against the said defendant in error made at the close of the testimony introduced on behalf of the said defendant in error (plaintiff in said district court).

Third. The said supreme court erred in sustaining the decision and ruling of the said district court in giving each of the instructions to the jury which it did give at the instance and request of the defendant in error and designated and numbered 5th, 6th, 8th, 9th, 10th, 11th, 12th respectively, and which were in the following form and language, to wit:

129 "5th. The burden of proof is in this case, as in all other cases like it, upon the plaintiff to make out his case to your satisfaction. The law is well settled, both here and in England, our mother country, that the employer should adopt such suitable implements and means to carry on the business as are proper for that purpose, and where there are injuries to its servants or its workmen and they happen by reason of improper or defective machinery or appliances in the prosecution or carrying on the work which they are employed to render the employer is liable, provided he knew or might have known by the exercise of reasonable skill that the apparatus was unsafe and defective. If, by reasonable and ordinary care and prudence, the master may know of the defect in the machinery which he operates it is his duty to keep advised of its condition and not needlessly expose his servants to peril or danger. The servant has no means of ascertaining the defect as a master has. He should therefore exercise that care which devolves upon a prudent employer in like circumstances.

"As I said before, it is not necessary that the master should know that the materials or machinery are defective or unsafe to be sufficient to hold him for a liability for any injury arising therefrom if he could have known if he had exercised reasonable care."

"6th. The rule is unqualified that the master is bound to use all reasonable care, diligence, and caution in providing for the safety of those in his employ and furnishing for their use in his work sound and suitable tools, implements and appliances, and machinery in the prosecution thereof and keeping the same in repair."

130 "8th. In this case, if you find that the plaintiff was injured in consequence of the wreck of the train caused by a crack and break in one of the wheels of the car on a train operated by the plaintiff, if you find that by the exercise of proper care and caution in inspecting the wheels the crack was of such a nature that it might have been discovered by the agents or servants of the defendant employed for that purpose, then such neglect to discover the crack was negligence on the part of the defendant and for which it may be held liable in this action."

"9th. If you find that there was a want of care and diligence on the part of the persons engaged in inspecting the wheels of the cars of defendant and that the accident was caused thereby it is not a defense for the defendant to show that it used proper diligence and care alone and only in the selecting of such agents, but the defendant is responsible for the acts of his employees in repairing and inspecting machinery to the same extent as if he were himself present doing the act."

"10th. If you find for the plaintiff that there was no negligence on his part and that there was negligence on the part of the de-

fendant, then you come to the measure of damages. The plaintiff is entitled to recover such damages as shall compensate him for all the injuries he has suffered, and you may take into consideration the extent to which the plaintiff has been permanently disabled, the suffering he has undergone bodily and mentally and which he is liable to undergo from this accident hereafter, and also, as I have said, the mental agony and suffering that he has suffered or
131 may suffer in consequence of this accident, but you may not take into consideration, in estimating the amount of damages, the cost or expenses or the expense of employing counsel in bringing his suit to trial for the purpose of recovering these damages."

"11th. As I have already intimated, in a case of any injury to the plaintiff by the negligence of the defendant, if it appears that the plaintiff himself has also been negligent in the same connection; that his own negligence or want of ordinary care and caution so far contributed to the injury complained of that but for such concurring negligence on his part the accident would not have happened, he is guilty of what is known in the law as contributory negligence, and in that case the plaintiff cannot recover for such injury. The complaint alleges that the plaintiff was free of any such negligence as that, but if you find from the evidence that the train on which the plaintiff was engaged as a brakeman at the time of the accident or injury consisted of twenty-five cars or thereabouts, that the train was going down a heavy grade or hill, and that the plaintiff and a fellow-brakeman set brakes only on six or seven cars, and if you further find from the evidence that the plaintiff in the exercise of ordinary care should have set a larger number of brakes, and that his failure to do so caused or tended to cause the breaking of the wheel, then you may find for the defendant."

"12th. In employing the plaintiff the corporation defendant did not become an insurer of his life or his safety. The servant takes the ordinary risks of his employment. The duty of the defendant towards him was the exercise of reasonable care in furnish-
132 ing and keeping its machinery and appliances about which he is required to perform his work in a reasonably safe condition. It was the defendant's duty also to use like ordinary care in selecting competent fellow-servants and in a sufficient number to insure that the work would be safely done, and this duty was discharged by the defendant if the care disclosed by it in these several matters accorded with that reasonable skill and prudence and care which careful, prudent men engaged in the same kind of business ordinarily exercise."

Fourth. The said supreme court erred in sustaining the action and ruling of the said district court in refusing to give each of the several instructions, which it did refuse to give, asked by the plaintiff in error and numbered, respectively, third, fourth, fifth, sixth, seventh, and eighth and which were so requested in the following language and form, to wit:

"Third. In employing the plaintiff as brakeman on its trains the defendant did not become an insurer of his life or safety. Its

duty towards him was simply to exercise ordinary care in furnishing and keeping its machinery and appliances with and about which he was required to perform his work in a reasonably safe condition; also to use like ordinary care in selecting competent fellow-servants and in sufficient number to make it probable that the work would be safely done, and this duty was discharged by the defendant if the care bestowed by it in these several matters accorded with that reasonable skill and prudence which experienced men engaged in the same kind of business ordinarily exercise."

"Fourth. The plaintiff by his contract of hiring was held to assume the risks of injury from the ordinary dangers of the
133 particular employment and the nature of the business engaged in, and if you find from the evidence that the accident causing the injury in question was one of the perils incident to the employment your verdict should be for the defendant."

"Fifth. The presumption of the law in this case is that the defendant exercised proper care and diligence in employing competent and sufficient number of servants to safely carry on its several departments of labor and in furnishing safe machinery and appliances with which the plaintiff was to do his work, and the burden of proof to show the contrary is on the plaintiff.

"You are further instructed that as between employer and servant, as in this case, negligence on the part of the former is not proven nor to be inferred from the existence of a defect which caused the injury."

"Sixth. Although the inspector of the defendant at Green River station, whose duty it was to inspect the said broken wheel, was guilty of negligence in making the inspection, and that negligence resulted in the wrecking of the train on which the plaintiff was, and the injury of which he complains, still he cannot recover in this action unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of such inspector or retaining him in his position, and to establish such negligence on the part of the defendant not only the incompetence of such inspector must be shown, but it must also be shown that defendant failed to exercise ordinary care to ascertain his fitness for that service prior to his appointment or failed to remove him after his incompetency had come to the notice of the defendant or to some officer or agent of defendant having power to remove him
134 or after such incompetency would have been ascertained by the exercise of ordinary care on the part of the defendant or such agent or officer."

"Seventh. To render the negligence of the inspector whose duty it was to inspect the said broken wheel the negligence of the defendant, or to render the defendant liable therefor, it is incumbent on the plaintiff to prove that the said inspector was appointed to or retained in his said position with knowledge on the part of the defendant, or some officer or agent of it having the power of appointment and removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable and

ordinary care and diligence on the part of the defendant or of such officer or agent,"

"Eighth. If the jury find from the evidence that the train on which the plaintiff was engaged as a brakeman at the time of receiving the injury consisted of twenty-five cars or thereabouts, that the train was going down a heavy grade or hill, and that plaintiff and his fellow-brakeman set brakes on only six or seven cars, and if you further find from the evidence that an application of brakes has a tendency to heat the wheels and the heat so produced is greater where only a small number of brakes are set; that a high degree of heat so produced has a tendency to cause the wheels to burst, and if you further find that the plaintiff in the exercise of ordinary care should have set a larger number of brakes, and that his failure caused or tended to cause the breaking of the said wheel, then you should find for the defendant."

135 Fifth. Said supreme court erred in affirming the judgment of the said district court.

Wherefore and in consideration of the said errors the plaintiff in error prays this court for judgment and reversal of said decision and judgment of said supreme court of Utah Territory, and that the said cause be remanded, with direction that such further action and proceedings may be taken therein as may be in accordance with law.

(Signed) P. L. WILLIAMS,
Attorney for Plaintiff in Error.

[Endorsed:] William Daniels *vs.* Union Pac. R'y Co. Assignment of errors. Copy. Filed Aug. 8, 1890. Jos. P. Bache, clerk supreme court Utah.

136 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Utah, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, — William Daniels, plaintiff and respondent, and The Union Pacific Railway Company, defendant and appellant, manifest error hath happened, to the great damage of the said Union Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1890, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, and the seal of the supreme court of the Territory of Utah, this 12th day of April, in the year of our Lord one thousand eight hundred and ninety.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk of the Supreme Court of Utah Territory,
By F. E. McGURRIN,
Deputy Clerk.

[Endorsed:] Wm. Daniels *vs.* Union Pacific R'y Co. Writ of error. (Original.) Filed Apr. 12, 1890. Jos. P. Bache, clerk supreme court Utah, by F. E. McGurrin, deputy clerk.

137 Know all men by these presents that we, J. T. Little and James Sharp, both of the city and county of Salt Lake, Territory of Utah, are held and firmly bound unto William Daniels in the full and just sum of twenty thousand ($20,000) dollars, to be paid to the said William Daniels and to his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of April, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the supreme court of the Territory of Utah, in an action pending in said court on appeal from the district court for the third judicial district of said Territory, a judgment in favor of the said William Daniels, the plaintiff therein, and against The Union Pacific Railway Company, a corporation, the defendant, rendered and entered in said district court, was affirmed by said supreme court, and the said Union Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment and a citation to the said William Daniels, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October, A. D. 1890:

Now, the condition of the above obligation is such that if the said Union Pacific Railway Company shall prosecute its said writ of error to effect and answer all damages and costs in full if it fail to make its plea good, then the above obligation to be void; else
138 to remain in full force and virtue.

(Signed) J. T. LITTLE. [SEAL.]
JAMES SHARP. [SEAL.]

Signed, sealed, and delivered in presence of—
(Signed) P. L. WILLIAMS.

The within bond approved by me this 12th day of April, 1890.
(Signed) C. S. ZANE,
Chief Justice of the Supreme Court of Utah Territory.

Endorsed on back: Title of cause. Supersedeas bond. Filed April 12th, 1890. Jos. P. Bache, clerk, by F. E. McGurrin, deputy clerk.

139 UNITED STATES OF AMERICA, } ss:
Territory of Utah, County of Salt Lake, }

I, Joseph P. Bache, clerk of the supreme court of said Territory of Utah, in pursuance of the attached writ of error, do return, annexed hereto and to said writ, the original citation, a transcript of the record, the proceedings, opinion, assignment of errors, supersedeas bond, all in and of said court in the cause in said writ described, to the Supreme Court of the United States; and I hereby certify that said annexed transcript of said record, proceedings, opinion, assignment of errors, and bond is a full, true, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and the seal of said supreme court of Utah Territory this 9th day of Aug., A. D. 1890, at Salt Lake City.

[Seal Supreme Court, Territory of Utah, United States of America.]

JOSEPH P. BACHE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Case No. 14,125. Utah Territory sup. court. No. 165. The Union Pacific Railway Company, plaintiff in error, *vs.* William Daniels. Filed September 1, 1890.

Office Supreme Court, U. S.
FILED.
JAN 8 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM DANIELS,
Defendant in Error.

No. 165.

BRIEF FOR PLAINTIFF IN ERROR.

ARTEMAS H. HOLMES,
For Plaintiff in Error.

JOHN F. DILLON,
Of Counsel.

C. G. Simpson, 16-19 Centre Street, New York.



Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 165.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILLIAM DANIELS,
Defendant in Error.

Brief for Plaintiff in Error.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

Statement of the Case.

This cause was brought by defendant in error, plaintiff below, in the District Court for the Third Judicial District of the Territory of Utah, against plaintiff in error, defendant below, to recover damages for personal injuries alleged to have been sustained because of defendant's negligence (Record, p. 1).

The complaint alleges that plaintiff was an employee of defendant's as brakeman on a freight train. That defendant by its negligence and carelessness allowed a wheel of one of its freight cars to become defective, by a large open crack in it, which rendered the car unsafe;

The defect was old and could have been easily discovered by a proper inspection. That defendant owed the duty to inspect all its car wheels; that an inspecting station was established at Green River, Wyoming, at which point the defect would have been discovered had defendant's inspection service at that point been suitable and sufficient; but that defendant negligently and wrongfully employed incompetent agents in that service; did not employ sufficient in number; that those employed negligently inspected, and the defect, by which the accident and ensuing injuries were caused, was not discovered, by reason of defendant's said negligence. That plaintiff was free from negligence and suffered injuries—the breaking of a leg, his collar bone, and great bodily and mental pain (pp. 1, 2).

The answer specifically denied the essential averments of the complaint (pp. 2, 3).

Plaintiff recovered a verdict of $10,000 (p. 4), and defendant moved for a new trial upon the grounds of (1) excessive damages given under the influence of passion and prejudice; (2) insufficiency of the evidence to justify the verdict, and that it was against law; and (3) error in law occurring at the trial and excepted to by defendant (p. 5).

The motion for a new trial was duly made upon the foregoing grounds (p. 42), and upon assignment of errors properly made (pp. 82, 83); the motions were overruled and defendant duly excepted (p. 83).

Defendant duly prosecuted an appeal to the Supreme Court of Utah Territory (pp. 83, 84), and the judgment below was affirmed (p. 85).

From that judgment a writ of error was sued out to the Supreme Court of Utah Territory, bringing the cause to this Court (pp. 87–92).

THE CASE MADE UPON THE EVIDENCE.

Plaintiff's Proofs.

By Plaintiff :

He had resided upon the line of defendant's road for several years prior to the accident ; at the date of the accident he was a brakeman on freight trains and had been such between two and three years. His regular run was between Ogden and Green River ; not upon any particular trains, but went as directed. Upon the occasion of the injury he had been running from Ogden east ; at Green River he exchanged from his regular crew to the crew of the freight train on which the accident happened, being section 4 of train 19, going west (p. 6).

The train had been made up as usual at Green River and started with the usual crew for twenty-five cars, namely, engineer, fireman, conductor, head and second brakemen. At the time of the accident the train was running west from Green River, going down a hill, and plaintiff was engaged in the usual occupation of apply- and loosening, or holding, the brakes of several of the 25 cars, because of the descending grade (p. 7).

Plaintiff's description of the accident was :

I saw a flash of fire about the time it occured ; I saw something strike the dump on the south side of the track and make a dust, and at that time I was whirled right about and grabbed the running board of the car, and that is the last I remember until I was under the car. He was removed as promptly as the circumstances permitted from his posicion. beneath or between the cars, and removed to Green River (p. 8).

The remainder of the plaintiff's testimony is a narrative of his sufferings, the attendance of the physicians and the physical results of his injuries.

Upon cross-examination no modification of the testimony of plaintiff was made, but he confirmed his

testimony in chief; and that he had been nearly a year upon this part of the line of the defendant company as brakeman (p. 14).

The train was not an uncommon one, and the grade, at which the mishap took place, not extra heavy; the accident was the breaking and flying out of a wheel from a car which was six or seven cars in the rear of the engine; the plaintiff was upon a car three or four cars behind the car whose wheel broke. One brakeman was supposed to be able to hold—that is, to brake—the train in question, or like trains, down the Green River or Bryan Hill, where the accident occurred (p. 16).

The accident happened at the beginning of a deep cut (p. 18).

The observation of a flash of fire from under the car is often produced by friction of the brakes, and is not an uncommon sight at night (p. 19).

ROBINETTE, a witness for the plaintiff, testified:

His occupation was as car repairer or car inspector, for the defendant company, had been in defendant's employ fourteen years, and as a car inspector seven years (p. 24).

He describes the ordinary method of inspecting the running gear, and particularly the wheels of cars, and testified that while the sound made by the blow of a hammer upon the wheels was always used, the sound was chiefly a guide as to whether or not to look more closely, according to the ring of the wheel, for cracks in the wheel; that cracks were generally found by sight, not by the hammer. The trains were by custom inspected immediately upon their arrival at the inspecting Station; the presence of a crack in a wheel is more readily discovered when the wheel is warm, from the results of applying the friction by the brake, than when cold, because if any grease or dirt is upon the wheel, the crack behind the grease is indicated better through the grease on the wheel when warm and is more easily observed then, than when cold (pp. 24, 25).

Witness, with several other railroad men from Green River, was ordered to the wreck immediately after the accident. He described the appearance there, and stated that he, with others, discovered what was said to be the cause of the wreck—a broken wheel—a piece of a broken wheel. There were several broken wheels;

and the men found the piece of the broken wheel which was supposed to be the cause of the wreck (p. 26).

The witness said, using the plural :

" We found the wheel had been cracked before. It was an old break of the wheel. It was lying on the south side of the track, which was the south side of the train." From the piece of the wheel, could see from it that a new break in the wheel had been made, from a point indicated ; and from that point to another one could see that there had been grease and rust in the old part of the crack (p. 27) ; and the witness gave this testimony :

" Q. That being an old crack, having grease in it, if it had been examined the day before at Green River by a competent car inspector, could it have been seen ?

" A. Certainly ; yes, sir ; I think so ; there is nothing to hinder him from seeing it unless there was, well—there is no way to hide it at all—there could be part of it hid from inspection ; there was no way to hide it at all, but what you could see it, that is my recollection.

" Q. Did you see whether there was grease in the crack or not ?

" A. Yes, sir ; grease and dirt had worked into the old crack, that is grease and dirt, you know—dirty grease. I could not see whether it was dirt.

" Q. That was one of the ways you had of determining whether it was an old crack or not ?

" A. Yes, sir.

" Q. You say it had rusted ?

" A. Yes, sir.

" By the Court : Q. How much did you say, Mr. Robinette, was an old crack in that wheel or break ?

" A. Well, I do not say positively how long the crack was ; well, I will say twelve inches ; that is my recollection. It has been a good while ago, and I have paid very little attention to it. It was right across the bole of the wheel (pp. 27, 28).

On cross-examination of this witness he did not modify the direct testimony, except as indicated by statements to the effect :

I don't know as the wheel is more likely to break

when the train is going down grade than it is in any other place; they have as many breaks on level ground as they have on hills. The expansion of the wheel from heat would show the crack plainer than when it is cool, and sounding by hammer is not a certain test. If there is dirt or grease upon the wheel, and the wheel is cold, a crack, although existing, may be overlooked after a pretty close search. I don't say all cracks can be found. Sometimes, in my experience with a hot wheel, the crack will open so that it may be distinctly seen, and one could stick an ordinary knife blade into the crack, according to how long the crack is; then afterwards, the wheel becoming cold, that will close up. So that it is difficult to see it, but if there is any grease there in the crack it will show plainer behind the grease—plainer than if you scrape off the grease (p. 32).

DR. BENEDICT, for the plaintiff, testified to his attendance upon plaintiff as a physician, and the character and extent of his injuries (pp. 34 to 37).

BERGSTROM, for the plaintiff testified:

Was in the employ of the defendant at the time of the accident, and for six years previous was in the car department and inspected cars; was foreman of the car inspectors; had been such for five years previous to the accident. Was summoned to the place of the wreck, and attended there to clear away (p. 37).

When witness and others arrived at the wreck and inquired the cause of it, it was stated that a cracked wheel or broken wheel had caused the break. He saw part of a broken wheel, which was supposed to be the cause, lying on the south of the track, and stated that the broken wheel was sufficient to cause the wreck.

He examined the broken wheel; the biggest portion of the piece that was out of the wheel was a fresh crack, but the outside plate—part of the outside plate—had an old crack; that is, old enough so that grease had saturated into the crack; but the biggest portion of the piece that was cracked out was fresh broken (p. 38).

"Q. Was this crack such a one as could have been detected with the eye?

"A. Well, I suppose they could if they had got onto it, but it is hard telling if the inspector did or not,

or if anybody could; I suppose, if they got their eye on it, it would have been seen.

"Q. That is what I want to know of you; is it such a one as could have been detected?

"A. Oh, it was.

"Q. (Interrupting.) If the inspector had carefully examined the wheel?

"A. If it was big enough or long enough to be visible—that is, from the outside.

"Q. If he had examined it with sufficient care he would have detected it, would he—the inspector?

"A. Well, I don't know. I am no inspector myself. I don't know really how that would be. * * *

"Q. You say there was a part of the outside plate of this wheel that showed an old break—crack?

"A. Yes.

"Q. Grease—and dirty grease—worked into the crack?

"A. Yes.

"Q. But the most part of the break was fresh?

"A. The inside break was all fresh.

"Q. The inside plate was all fresh?

"A. The biggest part of the casting that was broke" (p. 39).

"Q. And there was a portion on the outside edge of each plate that was fresh broken?

"A. Yes, sir."

The witness had seen, when a wheel was warm, that it expands and shows a crack better than when it is cold it will close together when it is cold so that when it is cold the crack will close up pretty close. When cars stand in the yard and get cold, sometimes the crack can hardly be seen.

Witness paid no particular attention, no more than ordinary, to the broken piece of wheel (pp. 39, 40).

The outer plate spoken of is the one that would be on the outside of the car, not inside of the track.

"Q. Then it is the one which an inspector would approach if he was on the outside?

"A. Yes, sir.

"Q. And the old crack was clear through that outer plate?

"A. Yes, sir." (p. 41).

Plaintiff here rested.

Defendant moved for a nonsuit upon the ground that there was no testimony to go to the jury at all, upon the matters of negligence constituting plaintiff's cause of action; and no proof that there was an incompetent inspector at the inspection station at Green River, or an inadequate number of inspectors.

Motion denied. Defendant duly excepted (p. 42).

Defendant's Proofs.

Lindsley, defendant's witness, testified:

He is general foreman of the defendant's shops at Green River for the repair of engines and cars. In that position seven years. Is a machinist, and worked 25 years in different capacities upon different kinds of railroad employment—all capacities of brakeman, fireman, machinist, engineer. Was engaged in defendant's service about twelve years. Was present at wreck a few hours thereafter. Went there from Green River; discovered a broken wheel which was considered the cause of the wreck. A piece was detached from the portion of the wheel, other than the axle part. It was found in the cut on the south side of the track. It came from a new box car of the St. Paul Road. Witness made a careful inspection of this broken car-wheel (pp. 42-45).

The break was in the outside plate of the wheel; there was an old crack in the inside plate; the outside showed a crack; the line of the crack in the outside plate ran very nearly with the line of connection of the plates (p. 45).

Witness was not prepared to state the length of the crack; his memory served him that it was in the neighborhood of six inches or nearly a quarter of the way around the wheel on the outside plate. With the exception of the old crack, the appearance of the rest of the wheel was of good sound material; and, with reference to the time of the break, it was a new break in the wheel (p. 46).

"A crack such as this was shown to be—the heat of the axle would heat—heat—what we call a hot journal—would heat the hub of the wheel, and would tend to close that crack."

"At the time when the rim of the wheel is hot, the crack is open so that it can be easily observed with the eye. I have seen them so that I could shove a knife into them, and the next morning after they got cold you could not find them" (p. 47).

"An overheated wheel—heated on the outside rim, is very liable to burst" (p. 47).

In the experience of witness he had many opportunities of observing such cases.

"Q. I wish you would state whether or not in your observation you have found any cases of wheels bursting without defects that were observable or apparently sound wheels, from such cause, so far as you were able to.

"A. It would be hard for me to give dates—impossible for me to give days and dates, for any such thing, but I have seen such wheels—comparatively new wheels—with no breaks, burst when it was conceded by all those who had an opportunity to judge that it was caused entirely from overheating"—from heating on the outside by friction of the brake (pp. 48, 49).

The witness testified that he had known George W. Fogle, who was the car inspector who inspected the wheels of the car in the train in question; knew him two or three years and at the time of the accident. He was then car inspector at Green River. He worked under witness's direction in the car and repair shops and was repairer, oiler and in the different places leading up to the position of an inspector. Fogle was considered by witness a sober, industrious and thorough car inspector. Witness had watched Fogle in the performance of his duties daily, the same as witness had watched other men under his supervision (pp. 49–51).

When a car wheel bursts from overheating a new wheel is exactly as liable to burst as one with a crack, from the overheating of the rim (p. 52).

This witness also testified that the manner of applying and using the brakes upon such a train going downhill, as plaintiff testified he was doing at the time of the accident, was correct. The brakeman in such a case was doing his duty in going from car to car, using the brakes.

"Q. When you say that sometimes a crack will be seen hot, so that you can put a knife blade in it, and

cool you couldn't see it—I mean that you couldn't see it, or that an expert couldn't?

"A. I mean that an expert could not see it" (p. 53).

Witness made up his mind that this broken wheel was the cause of the accident when he examined it.

"Q. And that there was an old crack there?

"A. Well, I cannot say an old crack, sir; it was a brand-new wheel; there was a crack there—a crack that had been made before this accident.

"Q. Of course when you saw it—?

"A. You cannot call it a very old crack, because it was a brand new wheel.

"Q. The wheel was broken clear off when you saw it?

"A. Yes, sir.

"Q. And when you spoke about there being an old crack there, you mean something earlier than the occasion of the accident?

"A. Yes, sir."

I determined that fact by the looks of the crack; it showed that it was an old crack by having dust worked into it and particles of rust (p. 54).

"Mr. Linsley: Q. I wish you would state whether or not, from your observation of that break, there was anything about it that indicated, to your mind, that it might have readily been observed beforehand—was there anything about that crack that indicated to you it might have been readily seen if looked at?

"A. No, sir.

"Q. There was not?

"A. I think if that wheel had been examined when the rim was heated undoubtedly the crack would have shown itself visible to a car inspector. An ordinary car inspector—car inspection—would have observed that crack if the rim had been severely heated, but otherwise I don't think that an ordinary car inspection would have observed that crack, from what I saw of it" (p. 55).

McCullom, witness on behalf of defendant, testified:

"That he was a car carpenter; had been in defendant's employ nine years; had been so employed at Green River; had acted as car inspector; attended the

wreck, and confirmed witness Lindsley as to the competency of Fogle as a car inspector" (pp. 57, 58).

RILEY, witness for defendant, testified:

He was a car inspector for defendant at Green River for twelve years prior to the accident. Had found many car wheels that had been cracked, caused by being heated. The most were found when the wheel was hot. They are not easily found, because of contraction when the wheel cooled.

Confirmed former witness as to the manner of testing and inspecting wheel, and as to the qualifications of Fogle (pp. 61–63).

Have found cracks in cold wheels, but generally when heated. On trains coming to Green River from the East and going West the wheels were not often heated because there is no grade running into Green River from the East. Had found cracks in wheels coming from the East at Green River.

Inspected a passenger train with Fogle the morning before the accident; Fogle acting on one side of the train and witness upon the other (p. 64).

BROWN, witness for defendant, testified:

Car inspector; had been such on defendant's road at Green River; knew Fogle and confirmed former witness as to his capacity as a car inspector (pp. 65, 67).

MEADEN, witness for defendant, testified substantially the same as the witness Brown.

FOGLE, for the defendant, testified:

At the time of the accident had been in the employ of the defendant five years, at different places, and was then at Green River, where he was car inspector; had been oiler and wheel repairer, and car repairer generally.

Inspected the south side of the train to which the accident happened, at Green River; inspected all the wheels on the south side of the train; tapped them with the hammer and inspected them with the eye, both inside and out; had plenty of time to do the

work, and did it carefully, as he always did (pp. 69, 71).

Testimony closed.

The record contains all the testimony taken on the trial.

Specification or Assignment of Errors Relied Upon.

ERRORS AND GROUNDS ASSIGNED AS ERROR ON MOTION FOR A NEW TRIAL, RECORD, PAGES 82-83.

Second.

Insufficiency of the evidence to justify the verdict, and that the said verdict is against law in this, to wit:

a. The evidence fails to show that the crack in the said car wheel, alleged to have been the cause of the accident, could have been discovered by proper inspection, and fails to show that the said crack or defect would have been discovered at said Green River station if the service of inspection at that place had been suitable and sufficient.

b. It fails to show that the defendant negligently or wrongfully or at all employed, or had in its service, incompetent persons to inspect its car wheels at said place, or that it did not employ enough inspectors to properly do the work, or that those employed there hurriedly, improperly or negligently inspected the said wheels; and the said evidence further fails to show that the said crack in said wheel was not discovered through the carelessness or negligence of defendant.

Third.

Error in law occurring at the trial and excepted to by the defendant, as follows, to wit:

a. The Court erred in overruling the defendant's motion for a judgment of nonsuit, made at the close of the plaintiff's testimony.

b. The Court erred in giving each of the said instructions designated 5th, 6th, 8th, 9th, 10th, 11th and 12th (of these only alleged errors in 8th and 9th, *infra*, are urged).

c. The Court erred in refusing to give each of the "instructions requested by the defendant, and in the "form the same were asked, and which are numbered "third, fourth, fifth, sixth, seventh and eighth" (pp. 82, 83) [of these only the *fourth*, *fifth*, *sixth* and *seventh*, *infra*, are urged].

ASSIGNMENT OF ERRORS IN WRIT OF ERROR TO SUPREME COURT OF UTAH, RECORD, PAGES 87–91.

First. That the said Supreme Court of Utah Territory erred in sustaining the decision and action of the said District Court of the Third Judicial District of said Territory in overruling and denying the motion of the plaintiff in error (defendant is said District Court) for a new trial on the several grounds stated in said motion, and contained in the record herein, and thereby perpetuating and continuing the said error in said Supreme Court.

Second. The said Supreme Court of said Territory

erred in sustaining the decision and ruling of the said District Court in overruling and denying the motion of the plaintiff in error for a judgment of nonsuit against the said defendant in error, made at the close of the testimony introduced on behalf of the said defendant in error (plaintiff in said District Court) (p. 87).

8th. In this case, if you find that the plaintiff was injured in consequence of the wreck of the train caused by a crack or break in one of the wheels of the car on a train operated by the plaintiff, if you find that by the exercise of proper care and caution in inspecting the wheels, the crack was of such a nature that it might have been discovered by the agents or servants of the defendant employed for that purpose, then such neglect to discover the crack was negligence on the part of the defendant, and for which it may be held liable in this action (p. 89).

9th. If you find that there was a want of care and diligence on the part of the persons engaged in inspecting the wheels of the cars of defendant, and that the accident was caused thereby, it is not a defense for the defendant to show that it used proper diligence and care alone and only in the selecting of such agents, but the defendant is responsible for the acts of his employees in repairing and inspecting machinery to the same extent as if he were himself present doing the act (p. 89).

(Fourth.) The said Supreme Court erred in sustaining the action and ruling of the said District Court in refusing to give each of the several instructions, which it did refuse to give, asked by the plaintiff in error, and

numbered, respectively, third, fourth, fifth, sixth, seventh and eighth, and which were so requested in the following language and form, to wit (p. 89):

Fourth. The plaintiff, by his contract of hiring, was held to assume the risks of injury from the ordinary dangers of the particular employment, and the nature of the business engaged in, and, if you find from the evidence that the accident causing the injury in question was one of the perils incident to the employment, your verdict should be for the defendant (p. 90).

Fifth. The presumption of the law in this case is that the defendant exercised proper care and diligence in employing competent and sufficient number of servants to safely carry on its several departments of labor, and in furnishing safe machinery and appliances with which the plaintiff was to do his work, and the burden of proof to show the contrary is on the plaintiff.

You are further instructed that as between employer and servant, as in this case, negligence on the part of the former, is not proven nor to be inferred from the existence of a defect which caused the injury (p. 90).

Sixth. Although the inspector of the defendant at the Green River station, whose duty it was to inspect the said broken wheel, was guilty of negligence in making the inspection, and that negligence resulted in the wrecking of the train on which the plaintiff was, and the injury of which he complains, still he cannot recover in this action, unless it appears from the evidence that the defendant was guilty of negligence either in the appointment of such inspector or retaining him in his position, and to establish such neg-

ligence on the part of the defendant not only the incompetence of such inspector must be shown, but it must be also shown that defendant failed to exercise ordinary care to ascertain his fitness for that service prior to his appointment or failed to remove him after his incompetency had come to the notice of the defendant, or to some officer or agent of defendant having power to remove him, or after such incompetency would have been ascertained by the exercise of ordinary care on the part of the defendant or such agent or officer (p. 90).

Seventh. To render the negligence of the inspector, whose duty it was to inspect the said broken wheel, the negligence of the defendant, or to render the defendant liable therefor, it is incumbent on the plaintiff to prove that the said inspector was appointed to or retained in his said position with knowledge on the part of the defendant, or some officer or agent of it having the power of appointment and removal, that he was incompetent, or that such knowledge might have been obtained by the use of reasonable and ordinary care and diligence on the part of the defendant or of such officer or agent (p. 90).

ARGUMENT.

POINT I.

The Court erred in not granting the defendant's motions for a nonsuit.

The testimony of plaintiff's witnesses show that the cracking or breaking of a wheel was not an uncommon occurrence, hence it was one of the ordinary risks of the employment in which he was engaged, and which he is held to have assumed; and among them was the risk of injuries caused by the negligence of a fellow-servant.

He was an experienced brakeman and must be held to have entered upon and continued his employment with full knowledge of this danger. He, therefore, cannot primarily maintain an action therefor, unless within the rules of law applicable to such a case, he establishes negligence of the defendant, or the negligence of defendant's servant or agent which contributed to the injury.

No such proof was given, the case was barren of any such proof and the Court should have instructed the jury to nonsuit the plaintiff or render averdict for defendant.

The motion for a nonsuit was duly made and refused, and exceptions were duly taken thereon (when plaintiff rested, p. 42; at the close of the case, p. 82), and the rulings thereon were, among others, duly assigned as errors in the Supreme Court of the Territory of Utah (pp. 87–91.)

This assignment of errors is now renewed in this

Court, and we submit that the authorities in the decisions of this Court, to the effect that if defendant, at the close of plaintiff's evidence, and without resting his own case, requested and is refused a ruling for a nonsuit, that the refusal cannot be assigned for error, as stated in Columbia Railroad vs. Hawthorne, 144 U. S., 202, at page 206, and the cases there cited, do not apply in the case at bar, for the following reasons:

Under the statutes of Utah, and the practice in that Territory, the assignment of errors may be considered in the Supreme Court of Utah, and also in this Court. The statutes of Utah (Vol. 2, Compiled Laws of Utah of 1888, p. 277, Sections 3343, 3344), are as follows:

SEC. 3343, S. 455. An action may be dismissed or a judgment of nonsuit entered in the following cases:

1. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the Clerk to the defendant, who may have his action thereon.

2. By either party upon the written consent of the other.

3. By the Court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4. By the Court, when upon the trial and before the final submission of the case the plaintiff abandons it.

5. *By the Court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury.* The dismissal mentioned in the first two subdivisions is made by an entry in the Clerk's register. Judgment may thereupon be entered accordingly.

SEC. 3341, S. 456. In every case other than those mentioned in the last section, judgment must be rendered on the merits.

That the right to insist upon the error of the trial Court in denying the motion for a non-suit was not

waived by defendant, because of the introduction of its testimony, appears to be established by the section of the Code of Procedure of Utah, as follows:

SEC. 3652, S. 845. Upon an appeal from a judgment the Court may review the verdict or decision, or any order if excepted to, which involves the merits or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.

Apart from the special practice and rules applicable because of the jurisdiction where this cause was tried, this Court has laid down rules which seem applicable to this case, in the following cases, each of which came from Federal Circuit Courts:

Bayliss vs. Traveller's Ins. Co., 113 U. S. 116, 320.
Randall vs. B. & O. R. R. Co., 109 U. S., 478, 482.
Pleasants vs. Fant, 22 Wall, 116, 121.

Because of the fact that the decision of this Court in the Columbia R. R. Co. case was apparently based upon the law and practice which prevail in cases brought here from the Federal Courts, and not necessarilly applicable to a case brought here from a State Court, where statutes and rules of practice differ from the rules and practice in Federal Courts; and also because that decision appeared to be an instance where authorities have been gradually established, step by step, based upon a primary authority which was not sound, or which was erroneous in the case in which the primary authority was first applied; we urge the Court to re-examine the basis of the decision in the Columbia R. R. case.

In Grand Trunk Railway vs. Cummings, 106 U. S.,

700, where the rule is declared in this Court for the first time, Mr. Chief-Justice WAITE says:

"It is undoubtedly true that a case may be presented in which the refusal to direct a verdict for the defendant at the close of the plaintiff's testimony will be ground for the reversal of a judgment of a verdict in favor of the plaintiff, if the defendant rests his case on such testimony and introduces none in his own behalf; but, if he goes on with his defense and puts in testimony of his own, and the jury, under proper instructions, finds against him on the whole evidence, the judgment cannot be reversed, in *the absence of the defendant's testimony*, on account of the original refusal, even though it would not have been wrong to give the instructions at the time it was asked.

"The present case comes with this rule. The evidence introduced on the part of the company is not in *the bill of exceptions*, and the Court was not asked to instruct the jury to find for the defendant on *the whole case*. Under such circumstances, *it must be presumed, in the absence of anything to the contrary, that* when the case was closed on both sides, there was enough in the testimony to make it proper to leave the issues to be settled by the jury.

"In this we are not to be understood as saying that the instruction ought to have been given when it was asked."

It is apparent that the absence from the record of the defendant's proofs in that case was abundant reason for the ruling then made, and that the ruling was special, not general.

The next case cited in the Columbia Railroad case by this Court, is Accident, &c., Co. vs. Crandall, 120 U. S., 527 and 530, where this language is used:

"The refusal of the Court to instruct the jury, at the close of plaintiff's case, that she was not entitled to a recovery cannot be assigned for error, because the defendant, at the time of requesting such instructions, had not rested its case, but afterwards went on and introduced evidence in its own behalf,"

and cites Grand Trunk vs. Cummings, *supra*.

Clearly, if the decision in the Grand Trunk case was specially applicable to the case then at bar and not applicable as a general rule, the decision in Accident Co. vs. Crandall, based upon the Grand Trunk decision, might well be regarded as without authority.

The next case cited is Northern Pacific vs. Mares, 123 U. S., 710, 713, where the Court says:

"It appears on the bill of exceptions that, at the close of the plaintiff's case, counsel for defendant moved for a nonsuit, which the Court denied, exception was taken, which is still insisted on here; defendant's counsel, however, offered evidence in support of the defense, and thereby waived this exception (Accident Co. vs. Crandell, 120 U. S., 527)."

So the decision in that case also, may be said to rest upon no stronger authority than the decision in the Accident &c., Co. case.

The last case cited is Robertson vs. Perkins, 129 U. S., 233. In that case this Court, after making a statement to the same effect as in Northern Pacific vs. Mares, made a similar ruling upon the authority of the Accident &c., Co. case.

In the Accident Ins. Co. case Mr. Justice GRAY, in addition to the Grand Trunk case, cited only Bradley vs. Poole, 98 Mass., 169.

In that case the ruling upon the question was at page 179, as follows:

"After the plaintiff's testimony was put in, the defendant's counsel requested the Court to rule that, assuming that all the facts offered to be proved by the plaintiff were actually and fully proved, the plaintiff was not entitled to recovery, and the case should be withdrawn from the jury, and a verdict rendered for the defendant. This motion was denied, and defendant excepts to the decision. But it is settled that it is a

matter of discretion with the presiding Judge whether he will grant or deny such motion (citing three cases in 4 and 5 Cushing). No exceptions therefrom lies to his decision; the defendant then proceeded to offer evidence in the case, and by the authority of the cases cited this was a waiver of his motion."

Upon this appeal this Court is not asked to reconsider the decision in the Columbia R. R. Co. case, so far as it is applicable to cases brought here from the Federal Courts; but to reconsider that ruling so far as it applies to cases brought here from the Supreme Court of Utah, where, as in other Code States, so to speak, the law and the practice permits an appeal from the denial of a motion to dismiss a complaint at the close of plaintiff's case. In such jurisdictions defendant may, must, indeed, proceed with the proofs on its part.

The distinction contended for is proper and logical, especially in cases where the defect or insufficiency of plaintiff's proofs at the time of making the motion for nonsuit was not supplied or cured by defendant's proofs; and this was the fact in the case at bar.

The ruling in the Columbia R. R. Co. case, if applied generally to cases from States where the laws are as in New York, Washington, Utah and others, as well as to cases from the Federal Courts, would be repugnant to and subversive of the statutory law and the practice prevailing in such States.

It is a matter of statute law and of practice, and not a matter of general law.

POINT II.

The trial Court erred in the instructions to the jury at 8th and 9th, page 14, supra; and in refusing to give the instructions to the jury requested at 4th, 5th, 6th and 7th, pages 14–16, supra.

We submit that, upon an examination of the entire testimony in the case and the instructions to the jury given by the Court, it is obvious that defendant was seriously prejudiced, in that the rule of law governing the duty and relations of master and servant, where the servant is engaged in a dangerous employment, and where the injury suffered was due, if at all, to the negligence or omission of duty of a fellow-servant, was not correctly stated.

Plaintiff was an experienced and competent brakeman, and the occupation in which he was engaged was notoriously dangerous, and, while it is true that no negligence upon the part of the plaintiff was shown, it was evident that, if the plaintiff suffered from any negligence or lack of the performance of duty on the part of the defendant or its agents or servants, it was because of the negligence of a co-servant, the car inspector Fogle, who was the fellow-servant of the plaintiff, engaged in the same general duty and in a common employment and in and about matters germane to and a part of the management and operation of the rolling stock of a freight train.

B. & O. Railroad vs. Baugh, 149 U. S., 369, 383–384, 389.

It must be conceded that no negligence or omission

of duty on the part of any officer or agent of defendant was shown in the case, *unless it was negligence or omission of duty on the part of Fogle.* It is also apparent upon all the proofs, that the defect which caused the accident whereby plaintiff was injured was the result of a latent, hidden and obscure defect—one which might readily be overlooked by the most skillful and painstaking expert in the business of wheel inspecting.

We submit, also, that plaintiff and Fogle were not employed in distinct or independent departments of service, and that here was no question as to the car inspector being the vice-principal, representative or *aliter ego* of defendant, as was the case in *Hough vs. Railway Co.*, 100 U. S., 213–218, and in *Northern Pacific vs. Herbert*, 116 U. S., 642–647, and like cases.

The cases of *Chicago, &c., Co. vs. Ross*, 112 U. S., 377. 383; *Schoville vs. Railway Co.*, 114 U. S., 615; *Quebec S. S. Co. vs. Merchant*, 113 U. S., 375; *Gunther vs. Insurance Co.*, 134 U. S., 110; *Washington R. R. Co. vs. McDade*, 135 U. S., 554–569; *Bunt vs. Mining Co.*, 138 U. S., 483; B. & O. R. R. Co. vs. Baugh, 149 U. S., 368, 384–387, are the cases wherein rules of law are established and applied to cases parallel to this case, and are applicable here.

In this case it would seem that Mr. Justice HARLAN's limitation of the rule applied in the Hough case, at page 218, fits the facts in the case at bar in all respects. That language is as follows:

"To guard against misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty in that respect to its employees is discharged when, but only when, its

agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees."

The proofs establish that the defendant was within that limitation, and, if so, that the injury suffered by the plaintiff was the result of acts of a co-servant—a fellow-servant engaged in the same general duty and in the common employment with plaintiff, for which defendant is not liable.

Instruction *8th* was erroneous, because it lacked the qualfication that defendant was bound to exercise only reasonable or proper, or ordinary care in the selection of the car inspector, its agent. It permitted the jury to conclude that, although the defendant had performed its full duty in the selection and employment of its agent, nevertheless, *if they found that the car inspector, no matter how cautious and competent,* MIGHT have discovered the defect, defendant was liable. This was equivalent to saying that defendant was an insurer or guarantor that its properly selected agent would be infallible ; that defendant insured the sufficiency of the wheel, as well as the competency and faithfulness to duty of the inspector, *a fellow-servant.*

Instruction *9th* was correct only as to a person acting as an agent, an *aliter ego* of defendant, for corporations act only by agents ; but it was erroneous as to a fellow-servant or co-employee of plaintiff engaged in a common service. So the jury was again permitted to conclude that defendant was in the relation of insurer or guarantor of a fellow-servant of plaintiff, although selected and continued in his employment *by the exercise of the highest care of the employer.*

The *Fourth, Fifth, Sixth* and *Seventh Instructions,* which were requested by defendant and refused by the Court, correctly stated the rules of law applicable to the case. The instructions given by the Court did not contain propositions substantially equivalent to the instructions refused. Hence the refusal was error, in each instance.

POINT III.

Appellant insists that upon the condition of the proofs when plaintiff rested, as well as at the close of the case, plaintiff had failed to establish the burden imposed upon him and essential to any recovery, namely, any negligence or omission of duty on the part of defendant or its agents which contributed to the accident or injury.

B. & O. Railroad vs. Baugh, 149 U. S., 368, 385-387.

POINT IV.

The instructions given to the jury by the trial Court, as well as those refused by it, and to which the errors are assigned here, bore directly upon the principal issues on trial, and tended to prejudice the jury against the defendant. Said instructions did not correctly state the rules of law applicable to the issues and the facts bearing upon them, as proved upon the trial; and it cannot be known how much the jury was influenced by said instructions.

POINT V.

The judgment of the Supreme Court of the Territory of Utah should be reversed, with directions to grant a new trial.

ARTEMAS H. HOLMES,
For Plaintiff in Error.

JOHN F. DILLON,
Of Counsel.

Office Supreme Court U. S.
FILED.
DEC 18 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

Term No. 165.

THE UNION PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

WILLIAM DANIELS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF UTAH.

BRIEF FOR DEFENDANT IN ERROR.

ARTHUR BROWN, ATTORNEY.

SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
WILLIAM DANIELS, DEFENDANT IN ERROR.

THE UNION PACIFIC RAILWAY COMPANY,
PLAINTIFF IN ERROR,
vs.
WILSON I. SNYDER, ADMINISTRATOR OF THE ESTATE OF WM. DANIELS, DECEASED,
DEFENDANT IN ERROR.

STATEMENT OF FACTS.

Since this writ of error was brought into this court, the defendant in error, Wm. Daniels, has died. I therefore print both titles at the heading.

This is an action brought in the Third District Court of the Territory of Utah; from there appealed to the Supreme Court, and from there this writ of error is sued out. The case was tried by a jury, being an action for damages brought by the plaintiff, a servant, against the master. Wm. Daniels was the employee of the Union Pacific Railway Company in the capacity of a brakeman running on its main line. On the night of the

injury, the 3d day of April, 1887, he was engaged in his business as brakeman on a freight train running from Green River westward. Going down a long hill, several miles long, he was ordered to a post of duty on top of the train to set brakes at different points, and was engaged in that duty when the whole train was suddenly wrecked, and plaintiff was very severely injured, legs, thighs and pretty nearly everything else maimed and broken. Subsequent examination as to the cause of the accident disclosed that there was a wheel on one of the cars in the train that had an old crack in it, and was broken, and it was the judgment of all the parties who examined it that that crack had been the cause of the disaster and wreck of the train; it was a very heavy wreck, taking several days to clear up the debris.

The trial of the case was had with very little objection or exception on either side; and the motion for non-suit and the charge of the court both center upon one proposition, that is, whether the railroad company was guilty of negligence in not properly inspecting the wheel, or so inspecting it under the circumstances as not to have discovered the defect.

BRIEF AND ARGUMENT.

The plaintiff was an employee—a brakeman—of the defendant, a railway company, and brings suit for injury received in the course of his employment, arising from the negligence of the defendant to furnish and keep in repair the wheels of one of the cars upon which the defendant was working.

The negligence complained of in the complaint was of a double character.

1. That the crack in the said wheel from which it broke was an old crack, and could have been easily discovered by proper inspection of the wheel.

It was the duty of the defendant to inspect the wheels of all cars used by it on its road, at stations at short intervals along

the line of its road. The defendant has established an inspecting station at Green River, Wyo., and the defect would have been discovered at that place, had the service been suitable and sufficient. But the defect in the wheel, by which the accident hereinafter mentioned was caused, was not discovered, through the negligence and carelessness of the defendant.

It is also charged, in other language, "that the defendant, through its negligence and carelessness, allowed a wheel of one of the freight cars used by the defendant along its road to become defective, by reason of a large and open crack in said wheel, which rendered it unsafe to use the same, or the car to which it was attached."

2. In addition to the charge of negligence in using the wheel having an old crack, which could and should have been ascertained, the plaintiff also charges that in fact the defendant negligently and wrongfully employed incompetent workmen, agents and servants, to inspect at that point (Green River), and did not employ enough inspectors to properly do the work, so that they hurriedly, negligently and improperly inspected the wheels.

The evidence on the part of the plaintiff was addressed mainly to the first branch of his negligence. He did not assume, in the opening of the case, at least, to show that there was an insufficient number of inspectors, or that the inspecting agents themselves were on other occasions and at other times incompetent. He confined the proof to the fact that on this occasion a wheel, which could, should and would have been inspected and discovered to have been defective, was passed as sound and allowed to be used.

On this subject, the defendant complains that the evidence is insufficient to justify the verdict. (Second Assignment of Error, a.)

A number of witnesses testified, both for the defendant as well as for the plaintiff, that such a crack as that could have been

seen. We specially call attention to the testimony of Cornelius W. Robinette, in the employ of the defendant and an expert car inspector. On page 41 he testifies: "Q. That being an old crack, having grease in it, if it had been examined the day before at Green River, by a competent inspector, could it have been seen?

A. "Yes sir; I think so. There is nothing to hinder him from seeing it, unless there was—well, there is no way to hide it at all, there could be part of it hid from inspection. There was no way to hide it at all, but what you could see it, that is my recollection." (See also pages 40—49.)

The witnesses for the defendant entirely corroborated Mr. Robinette on this subject.

Now, as the crack in the wheel could have been discovered, it was the duty of the master to see it, and servants that he employed to examine for the crack were servants doing the master's duty, for whose action or non-action, for whose omission, and for whose negligence he is responsible to other servants.

This subject is fully discussed in all the more recent cases. I refer specially to the case of Fuller vs. Jewett, 80 N. Y., 46:

"The duty of maintaining machinery in repair for the protection and safety of employees is the same in kind as the duty to furnish a safe and proper machine in the first instance."

The Court say:

> "We understand the principle of these cases to be that acts which the master, as such, is bound to perform for the safety and protection of his employees cannot be delegated so as to exonerate the former from liability to a servant who is injured by omission to perform the act or duty, or by its negligent performance, whether the non-feasance or mis-feasance is that of an agent, of a superior officer or servant, or of a subordinate or inferior officer, servant or agent, to whom the duty of forming of the act or duty has been committed. In either case in respect to such duty or act, the servant

who undertakes or omits to perform the duty is the representative of the master, and not a mere co-servant with the one who sustains the injury. The act or omission is the omission of the master irrespective of the grade of the servant whose negligence caused the injury, or of the fact whether it was or was not practicable for the master personally to perform the act, or whether he did or did not do all that he could do, in selecting competent servants, to secure the safety of his employees."

Flike v. Boston & Albany R. R. Co., 53 N. Y., 549.
Ford vs. Pittsburgh R. R. Co. 110 Mass. 240.
110 Mass 240.
Elmer vs. Locke, 135 Mass. 587.
R. R. Co. vs. Herbert, 116 U. S., 642—654.
8 Allen 447.
36 Am. R. 244.
Hough vs. R. R. Co., 100 U. S.
Bowers vs. R. R. Co., Pac. Rep.
Patterson vs. R. R. Co., 76 Penn. St. 384.
Lanning vs. N. Y. & N. Y. Cen. R. R., 49 N. Y. 521.
Huddlestone vs. Lowell Machine Co., 106 Mass. 282.

These authorities cover also the assignment (b) that the evidence is insufficient to show that the defendant negligently or wrongfully or at all had or employed in its service incompetent servants to inspect its wheels, etc. It was not necessary for the defendant to show that the servants were actually incompetent. That would have been a distinct ground of negligence, to be sure, and might have been the foundation of an action. It was alleged, but it was not all that was alleged. The other cause being alleged and proved, it was immaterial whether, either as defense or as a cause of complaint, the defendant did, or did not, have sufficient inspectors in number, and whether on these occasions they were negligent or not. The duty was one that belonged to

the master to do, and he must do it, whether those that he delegated to do it were competent or incompetent, he was liable.

Same authorities as above.

II.

It is a sufficient answer to assignment (c) that there is not the slightest evidence to sustain the charge, that the plaintiff was guilty of negligence in not setting a sufficient number of brakes. No evidence was given that the brakes that he testified to having set were insufficient to properly handle the train, and his testimony is uncontradicted as to the manner of setting them.

III.

The motion for non-suit was not sufficient in form. The sole ground taken was, that there was no proof that there was an incompetent inspector, or an inadequate number of inspectors. It was not necessary, for reasons already discussed. If there was negligence in not inspecting, it made no difference whether the inspectors were sufficient or insufficient in number.

IV.

The fifth charge to the jury is a truism, about which there is no conflict. Cases above cited fully authorize that rule of law.

And the same may be said of the sixth, eighth and ninth charges. They are all re-statements of the general principles of law that it is the master's duty to provide machinery and appliances reasonably safe, and to keep them in repair. Both branches of this law are elementary. Authorities without end might be cited to sustain them.

The tenth charge was but a statement of the general rule of damages, in the same language as that stated in the case of Bowers vs. R. R. Co., decided in this court, and upon the authorities there cited.

The eleventh request to charge was given at the request of the defendant and was in his favor.

The twelfth request is the same, word for word, as his third request. For the refusal to give it error is assigned. It was given not only in substance but in the exact language, with the addition of the words, "the servant takes the ordinary risks of his emyloyment," a subject which also was requested by the defendant.

By comparison, it will be seen that the defendant cannot complain of failure to give any one of the requests.

His request number three is verbatim that of number twelve as we have just stated.

Request number four simply states the doctrines that the servant takes upon himself the ordinary risks of his employment. It is also charged in and is a part of the twelfth request. It was not necessary for the judge to repeat it, or to use the exact language of the defendant. The substance of it was given.

V.

The sixth and seventh requests are not law. They substantially ask the court to charge that in not performing a duty which belongs to the master he delegates it to a person whom he has reason to believe is a competent servant, that then he is not liable. The authorities are right the other way. They are the same that we quote under the first head. The duty which devolves upon the master to perform is one for the performance of which he cannot avoid liability, either by competent or incompetent servants. If the master hires the most competent servant, who does the duty negligently, the master is liable. It is not an answer to a charge of negligence in furnishing improper appliances or machinery, that the defendant has employed proper persons to secure the machinery, or competent agents; the machinery itself must be good. The appliance

must be suitable. It must be suitable in beginning; it must be kept good by repair. "Nor can he (the master) escape responsibility where it is his duty to supply suitable structures, instrumentalities or appliances by proving that he delegated to a *proper* agent their construction, superintendence or repair."

Elmer vs. Locke, 135 Mass. 577.

"His selection of defective machinery which is to be moved by steam power is of itself evidence of want of ordinary care, and allowing it to remain out of repair when its condition is brought to his notice, *or by proper inspection might be known* is culpable negligence."

116 U. S., 654.

The eighth request of the defendant was substantially the same as the eleventh given by the court. All the material part of it was there covered; although, as a matter of fact, there was no evidence to justify the court in giving any request on the subject of contributory negligence, as there was no evidence tending to show contributory negligence. But he did charge in substance as requested by the defendant.

The rule in Massachusetts, laid down in Elmer vs. Lock, 135 Mass. 577, has since been more fully and clearly stated in a number of cases. They are fully reviewed in the case of Rogers vs. Ludlow Man. Co., 144 Mass. page 203, et seq. The case of Spicer vs. South Boston Iron Company, 138 Mass. 430, more nearly resembles the facts of this case than any other, and I therefore refer to it, although the discussion of the law is not so full. There, instead of a crack in a wheel which might have been discovered by inspection, it was a crack in a hook, the hook giving way and resulting in injury to an employee. The facts are discussed and whether they are sufficient to authorize the verdict, and whether the master was liable for a failure to inspect. I quote the following language from it:

"The testimony of Morrison that the hook now looked as if there was a break previously to the main break. Of Harvey, that 'if a man made a careful examination of the hook, after making it, he might possibly, or if a man familiar with hooks examined it, he might perhaps, have discovered the flaw which caused the accident, but these flaws would not be visible on an ordinary inspection'—the fact that there was actually a visible crack or flaw in the hook above the flaw at the place of rupture, and that, as testified, iron will usually break in the weakest spot—taken together, tended to show that a careful inspection would have revealed the weakness of the hook."

The testimony of our witness on that subject, already referred to, Mr. Robinette, (Record page 27, folio 40) shows that we have a much stronger case:

"Q. Now, you said to the jury awhile ago that it was an old crack?

A. Yes, sir.

Q. Wont you state what evidence you had of that fact, that it was an old crack?

A. Well, along through here (pointing) I won't say just how long, because I don't recollect where it broke off, you could see—this is a new break from here out, but from here down to there you could see that there had been grease, had rust in there—had been broken off, so that there was grease and dirt and rust in there.

Q. That being an old crack, having grease in it, if it had been examined the day before at Green River by a competent car inspector, could it have been seen?

A. Certainly: yes, sir; I think so; there is nothing to hinder him from seeing it unless there was—well, there is no way to hide it all; there could be part of it hid from inspection; there was no way to hide it all but what you could see it; that is my recollection.

Q. Did you say whether there was grease in the crack or not?

A. Yes, sir; grease and dirt had worked into the old crack; that is, grease and dirt, you know—dirty grease; I couldn't say whether it was dirt.

Q. That was one of the ways you had of determining whether it was an old crack or not?

A. Yes, sir.
Q. You say it had rusted?
A. Yes, sir.

BY THE COURT: How much did you say Mr. Robinette, was an old crack in that wheel or break?

A. Well, I won't say positively how long the crack was—well, I will say 12 inches; that is my recollection; it has been a good while ago, and I paid very little attention to it; it was right across the bowl of the wheel.

MR. BROWN: Does this that you have marked in red represent what you understood to be that part of the crack?

A. Yes, sir; that is the best of my recollection."

The law on that subject is most ably and clearly stated in a brief prepared by the Hon. John F. Dillon, used here during the October term, 1888, in the case of James Coyne vs. The Union Pacific Railway Company. I quote from his brief:

"The confusion which exists in this branch of the law arises from the difficulty of determining what are the ordinary and what are the extraordinary risks of the employment. The nature of the master's duty and its extent have been frequently presented to this court, and the obligations which the law has created, as shown by its decisions, are:

"1.—The exercise of reasonable care to furnish suitable machinery and appliances to carry on the business for which he employs the servant.

Hough vs. Ry. Co., 100 U. S., 213.
Northern Pac. Ry. Co. vs. Herbert, 116 U. S., 642.

"This is a continuing duty and involves the exercise of like care in keeping such machinery and appliances in repair, including the duty of making inspections, tests and examinations at proper intervals.

R. R. Co. vs. Herbert, 116 U. S., 642.
Cunard S. S. Co. vs. Carey 119 U. S., 245."

The whole matter has also recently been reviewed in the Eighth Circuit Court of Appeals, and I refer to the case of

St. Louis and S. F. Ry. Co. vs. Farr, 56 Fed. Rep., 997.

In the same vol. see also

U. P. Ry. Co. vs. Callahan, 56 Fed. Rep., 989.

U. P. Ry. Co. vs. James, 56 Fed Rep., 1001.

Little Rock vs. Mosely, 56 Fed. Rep., 1012.

I reproduce from the latter case the last page as specially applicable to this case, and the authorities and discussions here had.

"Another error assigned is the refusal of the circuit court to charge that the plaintiff and the car inspectors employed by the defendant company were fellow servants, and that the plaintiff could not recover if his injuries were occasioned by the negligence of the car inspectors, in failing to properly inspect the coupling link which occasioned the injury. The authorities cited in support of this assignment are as follows:

Mackin vs. Railroad Co., 135 Mass., 201.

Keith vs. Northampton Co., 140 Mass., 175, 180, 3 N. E. Rep., 28

Byrnes vs. Railroad Co., 113 N.Y., 250, 21 N. E. Rep. 51.

Railroad Co. vs. Hughes, 119 Pa. St., 301, 314, 13 Atl. Rep. 286.

Wonder vs. Railway Co., 32 Md. 411, 418.

Railroad Co. vs. Webb, 12 Ohio St. 475.

Railway Co. vs. Gaines, 46 Ark. 555, 568.

Smith vs. Potter, 46 Mich. 258, 9 N. W. Rep. 273.

Smoot vs. Railway Co., 67 Ala. 13.

It is not to be denied that most of these authorities fully support the doctrine contended for; but on the other

hand in the case of Railroad Co. vs. Herbert, 116 U. S. 642, 652, 6 Sup. Ct. Rep. 590, it was held that as an obligation rests on the master to furnish suitable machinery, and to keep the same in repair, he is responsible for the negligence of those persons in his service on whom he has devolved the duty of inspecting machinery and appliances, and seeing that they are kept in a proper condition for use. The same doctrine is maintained by some of the State courts.

Fay vs. Railway Co., 30 Minn. 231, 15 N. W. Rep. 241.
Condon vs. Railway Co., 78 Mo. 567.
Bran vs. Railroad Co., 53 Iowa, 596, 6 N. W. Rep. 5.
Railway Co. vs. Dwyer, 36 Kan. 58, 12 Pac. Rep. 352.
Railroad Co. vs. Jackson, 55 Ill. 492.
Long vs. Railroad Co., 65 Mo. 225.

"It was also foreshadowed, if not distinctly announced, in the leading case of Hough vs. Railroad Co., 100 U. S. 213, and has been adopted by some of the circuit courts.

King vs. Railroad Co., 14 Fed. Rep. 277.
Carpenter vs. Railroad Co., 39 Fed. Rep. 315.

"With respect to the question under consideration, it is only necessary to further remark that we deem it our duty to follow the federal adjudications, (Railroad Co. vs. Baugh, 149 U. S. 368, 13 Sup. Ct. Rep. 914;) and, holding that view, it must be ruled that the trial court committed no error in refusing to charge as above explained."

I add the quotation referred to in the last case from R. R. Co. vs. Baugh, 149 U. S. 368:

"In the case of Hough vs. Ry. Co. 100 U. S., 213 and Northern P. Ry. vs. Herbert, 116 U. S. 642, this court recognized the master's obligation to provide reasonably suitable place and machinery, and that a failure to discharge this duty exposed him to liability for

injury caused thereby to the servant, and that it was immaterial how or *by whom* the master discharged that duty. The liability was not made to depend in any manner upon the *grade of service* of a co-employee, but upon the *character of the act itself*, and a breach of the positive obligation of the master."

I submit that this judgment should be affirmed.

Respectfully submitted,

ARTHUR BROWN,

For Defendant in Error.

(X) 152 U.S. 654

Office Supreme Court U. S.
FILED.
MAR 14 1894
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CLERK.

SUPREME COURT OF THE UNITED STATES.

No. 165.

UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

WILSON I. SNYDER, Administrator of the Estate of Wm. Daniels, Deceased,
Defendant in Error.

SUPPLEMENTAL BRIEF IN REPLY TO BRIEF FILED FOR PLAINTIFF IN ERROR.

ARTHUR BROWN,
Attorney for Defendant in Error.



SUPREME COURT OF THE UNITED STATES.

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UNION PACIFIC RAILWAY COMPANY,
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Defendant in Error.

SUPPLEMENTAL BRIEF IN REPLY TO BRIEF FILED FOR PLAINTIFF IN ERROR.

In this cause the defendant in error filed a brief before receiving copy of brief of plaintiff in error. I beg to submit two or three suggestions in reply, referring to the original brief, and the statements of fact therein contained. In reply to the brief for plaintiff in error, I have to say, that the statement of fact comprises not only the statements of fact upon the side of the plaintiff below, but also the testimony which was in conflict with it, and the assumed facts are on the basis of the truth of the testimony for the defendant below, plaintiff in error. This is misleading and contrary to the presumption.

After the jury have found upon the facts, it is assumed they have found upon all the facts in issue in favor of the prevailing party. A quotation from the testimony on behalf of the party defeated, is simply an attempt to arraign a few of the facts against the verdict of the jury, and it is improper to bring facts before the court in review, just as improper as it is to cite law to the jury. Railway attorneys are in the habit of speaking about the prejudice of jurors, but if railway attorneys would be more careful as to their practice before jurors and their practice before courts, perhaps courts would be more apt to reverse the verdicts of the former. In this case we had the law argued to the jury below, and now the learned counsel is attempting to argue the facts upon the appeal. The only facts that this appellate court can consider, are the facts which were produced by the plaintiff below; if those were sufficient to entitle the plaintiff below to recover, it is immaterial how many times or by whom they were contradicted. Why are they brought here? What function do they perform? What part in the drama do they play? Is it the proper or suitable thing to quote here the testimony of witnesses for the defendant below (plaintiff in error) to show the contradictions that had been made of the plaintiff's witnesses? The truth is, the witnesses for the plaintiff in error, defendant below, were not believed under oath, and the reasons were exactly those which appear upon the face of the brief for counsel. An improper thing was attempted all the time. It was attempted improperly to argue the law below. Attempted improperly to argue the facts here. Jurors are men of sense and they can discover an impropriety as well as the court.

I.

To reply to the specific points of counsel, point one contains two questions: First, as to what are the "ordinary" risks of an employment? Counsel says that the breaking of a wheel

was not an uncommon occurrence, hence it was one of the ordinary risks of the employment in which the plaintiff was engaged. "Ordinary risks" is a term frequently used, and sometimes misunderstood. Does counsel mean to say that because the Union Pacific Railway Company is ordinarily guilty of negligence, and frequent judgments are found against it for injuries, that therefor the negligence of the company is one of the things which its employees assume and undertake. That would seem to be the meaning of it as by him applied. Correctly understood "ordinary risks" are those which are necessary to the business, incident to the business and which care can not prevent. But applied by the learned counsel who prepared the brief, the greater the negligence of the company, the less it is liable. If a company is notoriously negligent, as the Union Pacific is, then it assumes no liability whatever. "Ordinary risks" do not mean "frequent risks." The word "ordinary" I admit, is an improper one; "suitable," or "undertaken," or "foreseen" risks would be better, but the learned counsel have the benefit of the invention in saying that "ordinary" means frequent. By violating a duty frequently neither a man nor a company can make such violation an "ordinary" risk.

Second—The second branch of the first point urged by counsel relates to the effect of a non-suit. This same subject was discussed before between the same counsel on both sides in the case of Union Pacific Railway Company vs. Redden, upon which the court divided, and no decision was rendered. Since that decision the court has rendered the opinion cited in brief.

Columbia R. R. Co. vs. Hawthorne, 144 U. S.

I am well satisfied with the brief of opposing counsel. He has shown to the court, after turning over and over again the carefully considered arguments in which counsel for plaintiff in error was represented, that introducing proof after motion for

non-suit is a waiver of the motion. So much for the Federal practice. I agree with him that the question thus settled for the Federal practice does not settle it for the Utah practice. But how are we to settle it for the Utah practice? The learned counsel asks you to review your own decisions and set them aside, and does not do us the honor of reading the decisions of the local courts. I believe it is the rule that judgments in local courts govern in local practice. The Federal rule is quoted in counsel's brief. The Utah rule is laid down in Brown vs. Southern Pacific Co., 7 Utah, 288-291. I quote the language:

> At the close of the evidence on behalf of the plaintiff, the defendant moved for a non-suit on the ground that no negligence on the part of the defendant had been shown; that, if any negligence had been shown which tended to produce the injury complained of, aside from the contributory negligence of plaintiff, it was the negligence of a fellow servant; and that plaintiff was guilty of negligence which contributed directly to the injury complained of. The motion was overruled by the court, and this ruling is claimed as error. Whether the motion should have been sustained or not is now immaterial, as the defendant *waived any error there may have been in the ruling of the court by failing to stand on its motion and in offering evidence in its behalf after the ruling of the court had been made.*"

The ruling of the Utah court seems to be as pointed as those of the Federal court, and the learned counsel will have to look for some other locality in which to apply his favorite doctrine of keeping a motion alive after it has died a natural death by his own action.

The second point raises the question of what is a fellow-servant. This is already discussed in the principal brief. I am aware of the distinctions between different departments, and distinctions between a servant under the command of another, and distinctions between different departments of service. But it is not a question here of any of these branches. Here the master

had a certain duty to perform, to-wit: to inspect the machinery.

It was a duty he could not shirk; it was imperative, mandatory upon him; the inspection of the machinery must be done by him. It made no matter how low the grade, how cheap the work; it made no matter by what name, or in what form, guise or shape this employment was done, the master must inspect the machinery; that is settled by every case I have quoted in the principal brief; settled by this court time and time again; settled by the court of Appeals of New York; by the Supreme Court of Massachusetts; settled in every supreme court in the nation (even Michigan, where they held almost everything they could in behalf of the railway companies, has so decided) and being the settled law, the railway company is not permitted to violate or shirk its duty by giving to the person who is to inspect the machinery the name of fellow servant, or by paying him petty wages, or by putting him at Green River or at any other place. The machinery of a railway company and used by it in a railway must be suitable to the use to which it is put; it must be properly in repair; the wheels can not be inspected according to the swiftness or slowness with which they revolve. It is not to employ merely competent human servants but the mechanical servants must be equally competent and known to be competent. So the courts have said, and your Honors have said, in the cases referred to, that the machinery originally must be in good repair, not only, *but it must be kept in good order by proper inspection.* The man that does it is not the fellow servant of the man that uses it. The repairer represents the master, not as his "alter ego," as counsel would have it; not as his vicegerent, but because he is doing the master's duty. It is not because the inspector at Green River is a president or vice-superintendent or grand mogul with a big salary, that the company is liable, but because he is doing the thing that the master guaranteed to Mr. Daniels that he would do, that is furnish proper rolling material and see it properly inspected.

We do not ask that they guarantee the safety of the employee, but a guarantee that tne material was sufficient for the purpose for which it was used, and that it was properly inspected. That is what we ask and what an employee has the right to ask. That is what this company entrusted to its inspector at Green River, and which it failed to furnish. It violated its duty to this employee when the inspection at Green River was incomplete; whether the agent was competent or not, the inspection was incomplete and incompetent because they passed a wheel with a big crack tweve inches long and rust and grease in it, and this man was injured by the failure of the company in its duty in that regard.

I believe the points covered by the rest of counsel's brief have been already discussed.

Most respectfully,

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